The Commonwealth of Massachusetts

MASSACHUSETTS SENATE
RECOMMENDATIONS ON PUBLIC RECORDS
STATE HOUSE, 02133

December 31, 2018

Mr. William F. Welch
Clerk of the Senate
24 Beacon St – Room 335
State House
Boston, MA 02133

Dear Mr. Clerk,

We are writing in our capacity as the Senate members of the Special Legislative Commission on Public Records. Enclosed, please find the Senate members' recommendations. Despite best efforts, the Commission was unable to come to an agreement on joint recommendations prior to the deadline. With the 190th General Court coming to an end, the Senate members of the Commission would like to submit for the record the recommendations we the undersigned have compiled to this point. We believe these recommendations find a balance between transparency and a deliberative policy making process. Should this Commission be revived and continued, we suggest these recommendations could helpful for continued discussions.

Sincerely,

Senator Walter F. Timilty
Senate Chair

Senator Cynthia Stone Creem
Commission Member

Senator Paul Feeney
Commission Member

Senator Donald F. Humason, Jr.
Commission Member

Senator Joan B. Lovely
Commission Member

Senator Mark C. Montigny
Commission Member

Senate Public Records Recommendations

December 31, 2018

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*a. **Background***

The Special Legislative Commission on Public Records was created in section 20 of Chapter 121 of the Acts of 2016. The Special Commission was required to "examine the accessibility of information concerning the legislative process of the general court and the expansion of the definition of public records."

(A.) Specifically, the Special Commission was charged with examining procedures and practices of the general court and its committees with regard to legislative process including, but not limited to:
(i) scheduling and notices of public hearing and legislative sessions;
(ii) scope and substance of committee hearings, including the number of bills heard at each hearing;
(iii) publication and availability of records concerning committee proceedings;
(iv) rules and scheduling requirements for committee reports;
(v) content of committee reports, such as summary;
(vii) accessibility of records concerning house of representatives and senate sessions.

(B.) The constitutionality and practicality of subjecting the general court, the executive office of the governor and the judicial branch to the public records law. In conducting its examination the special legislative commission shall examine, without limitation, the applicability and impact of Article XXI of the Declaration of Rights, Article XXX of the Declaration of Rights, Article 7 of Section 2 of Chapter 1 of Part the Second of the Constitution of the Commonwealth and Article 10 of Section 3 of Chapter 1 of Part the Second of the Constitution of the Commonwealth.

(C.) The procedures used by legislatures in other states and those used by the United States Congress for making information concerning the legislative process available to the public.
As mandated by the enabling legislation, the Special Commission included the following members:

- Rep. Jennifer Benson, House Chair of the Joint Committee on State Administration and Regulatory Oversight
- Sen. Walter Timilty, Senate Chair of the Joint Committee on State Administration and Regulatory Oversight
- Rep. William Galvin, House Chair of the Joint Committee on Rules
- Sen. Mark Montigny, Senate Chair of the Joint Committee on Rules 2

- Rep. Paul Donato, Appointee of the Speaker of the House
- Rep. Mike Moran, Appointee of the Speaker of the House
- Rep. Mathew Muratore, Appointee of the House Minority Leader
- Sen. Paul Feeney, Appointee of the Senate President
- Sen. Joan Lovely, Appointee of the Senate President
- Sen. Donald Humason, Appointee of the Senate Minority Leader
- Rep. James Murphy, Joint Appointee of the Speaker of the House and the Senate President
- Sen. Cynthia Creem, Joint Appointee of the Speaker of the House and the Senate President

The Special Legislative Commission on Public Records, over the course of five public hearings which were held both in and outside of the State House, has received testimony from various interested parties including:

- Common Cause,
- The American Civil Liberties Union of Massachusetts,
- The Massachusetts Town Clerks Association,
- The Massachusetts Taxpayers Foundation, and Mass PIRG.
- The Pioneer Institute
- The New England First Amendment Coalition
- The League of Women Voters of Massachusetts

In soliciting advice from these organizations, The Special Commission on Public Records sought to receive the educated input from these parties that have a vested interest in the free-flow of information regarding the day-to-day operations of the Legislative bodies of the Massachusetts General Court.

b. Senate Recommendations

The Senate members of the Special Legislative Commission on Public Records, hereby referred to as the members, recommend that joint committees shall provide a reasonable schedule of hearings early in the legislative session to be published by the Senate and House Clerks on the website of the General Court. The bills should be reasonably grouped by subject matter for each hearing. This measure is reflective of the current Joint Rules of the Senate and the House of Representatives[1].

In order to improve transparency, the members recommend that public notice of a hearing shall be provided seventy-two hours prior to the commencement of a hearing. Each hearing notice shall include an e-mail and physical address for the submission of written testimony. The members recommend that each joint-committee shall, upon request, provide a brief and easily understandable summary of each bill before the committee

In addition to the current requirements of Joint Rule 1(d) that hearings be limited, whenever possible, to 50 bills, the members recommend that the length of all hearings be subject to a reasonable restriction of four hours. This restriction shall be pursuant to the agreement of the chairs of the committee. Exceptions to this recommendation should be made in order to reflect the best interests of soliciting public comment regarding any persons present at hearings willing to provide oral testimony.

The members recommend that joint committees shall make available upon request, all written testimony received prior to all committee hearings and any testimony or other materials submitted in-person during the hearing process. The materials may include the following: agendas, list of anticipated speakers, and written testimony. In the case that the joint committee chairs should not agree to specific rules, a standard set of rules shall be provided by the House and Senate Clerks, upon their agreement.

The members recommend that any vote recorded either by electronic poll or by a vote of the “yeas and nays” during a committee meeting or executive session shall be made available on the public website of the General Court.

The members urge that there be collaboration by the offices of the Senate Clerk and House Clerk to create seminars addressing the practices and policies of open records in the Legislature. Specifically, each session, committee members and staff should be trained on public notice requirements of Joint Rules 1 and 1(d), as well as the availability of building resources to aid in live streaming and recording of joint-committee hearings. The aim is for these seminars to educate staff members on how best to ensure transparency of government in the Legislature.

[1] https://malegislature.gov/Laws/Rules/Joint

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c. Future Recommendations

The recommendations made by the Senate members are not all encompassing and should not be viewed as an end all-be all to the open records policies for the Massachusetts General Court. The General Court should continuously strive to adapt to changing technology and the needs of the general public to create a free flowing mode of information transparency. With this in mind, the Commission recommends convening a commission of similar membership every five years to further transparency in state government.

Finally, while this report focuses mainly on the Legislative Branch, it is a recommendation of the Senate members that further study be made into improving transparency with regards to open records throughout all levels of government in the Commonwealth.

d. Constitutionality Discussion

Testimony was solicited from several local professors with relevant expertise. Only one, Professor Lawrence Friedman of New England Law submitted testimony, which is below. Professor Friedman's testimony was found to be credible and his conclusions to be persuasive, particularly because they are consistent with the law of other jurisdictions.

Written Testimony: Legislative Exemption from Certain Public Records Requests

This testimony addresses the following questions:

(1) Does Article XXI of the Massachusetts Declaration of Rights provide a basis for exempting the legislature from certain public records requests?

(2) Does Part II, Chapter I, Section 2, Article 7 of the Massachusetts Constitution provide a basis for exempting the legislature from certain public records requests?

(3) Does Part II, Chapter I, Section 3, Article 10 of the Massachusetts Constitution, provide a basis for exempting the legislature from certain public records requests?

(4) Would a statute that subjects the Executive and Judicial branches of the Commonwealth to certain public records requests raise separation of powers concerns under Article XXX?

I first address the question of constitutional authority for a legislative exemption from certain public records requests, and then turn to the separations of powers issues potentially implicated by a statute that would subject the other departments of state government to certain records requests.

I. Authority to Exempt the General Court from Certain Public Records Requests

A. Article XXI

Article XXI provides that "[t]he freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." This Article serves to protect the citizenry's interest in having its representatives in the General Court "execute the functions of their office, without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). The Supreme Judicial Court in *Coffin* held that Article XXI's legislative privilege reaches all instances in which a representative is "executing the duties of his

office," including such activities as "the giving of a vote," "the making of a written report," and to "every other act resulting from the nature, and in the execution of, the office." *Id*. Moreover, the privilege is not confined to a representative's presence in the State House, as *Coffin* recognized "there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber." *Id*.; *see also id*. at 28 "[i]f a member … be out of the chamber, sitting in committee, executing the commission of the house, … such member is within the reason of the article, and ought to be considered within the privilege").

But the privilege is not limitless. In *Coffin*, for example, the court concluded the defendant could not use the privilege to shield himself from a defamation claim, because his allegedly slanderous remarks, while made in the legislature and to another legislator, did not concern a matter then before the legislature. As the court put it: "When a representative is not acting as a member of the house, he is not entitled to any privileges above his fellow-citizens; nor are the rights of the people affected if he is placed on the same ground, on which his constituents stand." *Id*. at 28-29. Relying upon this reasoning, the Massachusetts Superior Court, in *Irvin v. McGee*, 1 Mass. L. Rptr. 201 (1993), concluded that a member of the House of Representatives could not claim Article XXI immunity from a wrongful termination suit brought by a former employee, because personnel decisions are "anything but legislative." *Id*. at *4.

It follows that the legislative privilege provided by Article XXI applies to those communications and actions related to the execution of the duties associated with a particular legislative office. On the other hand, communications and actions will not be protected if they do not relate to the execution of the duties associated with the legislative office. Hence, the *Coffin* court's conclusion that the allegedly defamatory remarks by a representative, made to another legislator, were actionable—because they did not relate, in any way, to the execution of the defendant's duties as a member of the legislature. It seems reasonable to assume that, had the defendant in *Coffin* uttered the same remarks in a discussion of pending legislation in a committee meeting, or in a report relating to pending legislation, the result would have been different.

Two questions remain. First, what should be included, in determining whether the privilege applies, within the category of acts "resulting from the nature, and in the execution of, the office"? The *Coffin* court gave the privilege a liberal construction because it serves, ultimately, to protect the people themselves, by allowing their representatives to engage in the legislative process honestly—by enabling them, as the court put it, "to execute the functions of their office without fear of prosecutions, civil or criminal." *Id*. at 27. Even the *Irvin* court, which had ruled that the personnel decisions challenged by the plaintiff in that case did not fall within the privilege, acknowledged that the privilege could extend to matters that concern employees who "have an opportunity for meaningful input into the legislative process." *Irvin*, 1 Mass. L. Rptr at *4.

Second, against what potential actions does the privilege apply? The text of Article XXI makes clear that the privilege should prevail against "any accusation or prosecution, action or complaint, in any other court or place whatsoever." This language suggests that the framers of the

state constitution sought to protect the sanctity of legislative deliberation from the kind of deterrent to honest reflection and debate embraced by a wide array of threats, as indicated by the extension of the privilege to prevent intrusion by of any kind of "prosecution, action or complaint, in any court or place whatsoever." Such broad language reasonably should be understood to include public records requests, which are "actions" that could serve to undermine the constitutional goal of free deliberation in the General Court in much the same way as a criminal prosecution or a defamation suit. In light of the breadth of the text, moreover, courts facing the issue likely would be inclined to follow *Coffin*, and to give the final clause of Article XXI a liberal construction.

B. Part II, Chapter I, Section 2, Article 7 and Part II, Chapter I, Section 3, Article 10

Part II, Chapter I, Section 2, Article 7 empowers "[t]he senate [to] choose its own president, appoint its own officers, and determine its own rules of proceedings." Similarly, Part II, Chapter I, Section 3, Article 10 empowers the House of Representatives to "choose [its] own speaker appoint [its] own officers, and settle the rules and orders of proceeding in [its] own house…." The Supreme Judicial Court addressed the meaning of these provision in respect to the authority of each house to govern its internal proceedings in *Paisner v. Attorney General*, 390 Mass. 593 (1983). There, the plaintiff sought a declaratory judgment that the Attorney General certify an initiative petition intending, among other things, to make certain actions within each house public. The court concluded that the Attorney General correctly declined to certify the petition, because the initiative process under Article 48 is confined to "laws and constitutional amendments," and does not reach the internal procedures by which each house governs itself. *Id*. at 599-600.

The *Paisner* court reasoned that the constitution affords each house the authority to determine its own procedures. *Id*. at 599 (observing that, "[a]mong the unicameral powers of the respective Houses is the power of each branch to act alone in determining its own rules and other internal matters"). Determinations governing how much or how little of a house's deliberative process should be open to public inspection are within the compass of the internal rules for which each house is itself responsible. *Paisner* implicitly recognized this point, noting that the proposals in the initiative petition at issue would all fall within the purview of each house's internal rulemaking authority—which necessarily includes those aspects of the proposal aimed at publishing aspects of the legislative process. *See id*. at 599-600 (the proposal related to "internal legislative procedures, which are within the constitutional unicameral powers of the respective Houses"). Further, the *Paisner* court concluded that each house's rulemaking authority exists as a "continuous power absolute and beyond the challenge of any other tribunal," *id*. at 600, which suggests that constitutional rulemaking authority is immune from challenge on separations of powers grounds.

In other words, in addition to the broad deliberative process privilege the members of the General Court enjoy under Article XXI, the senate and the house of representatives each has the institutional power, pursuant to Part II, Chapter I, Section 2, Article 7, and Part II, Chapter I, Section 3, Article 10, respectively, to determine for itself the procedures it shall employ in

performing the legislative functions assigned it by Part II, Chapter I of the constitution. The power is discretionary, in the sense that each house may determine whether to open various parts of the lawmaking process to public scrutiny without binding the other house, or successive legislatures. *See Paisner*, 390 Mass. at 600.

II. Potential Separation of Powers Issues

It remains to examine any potential separation of powers issues raised by subjecting the executive and judicial departments to certain public records requests. Article XXX provides that, "[i]n the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise he legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Though the text calls for "complete and rigid division of all powers among the three branches" of government, *Opinion of the Justices*, 365 Mass. 639, 640 (1974), the prevailing interpretation suggests the provision demands a flexible, rather than strict, separation of powers, as "an absolute division … is neither possible nor always desirable." *Id*. at 641; *see also Opinion of the Justices*, 372 Mass. 883, 892 (1977) (Article XXX does not mandate "three 'watertight compartments' within the government"). Accordingly, while the General Court possesses broad authority under the constitution to make laws "for the good and welfare of [the] commonwealth[,]" Mass. Const., Pt. II, c. 1, § 1, art. 4, separation of powers issues arise when a legislative act authorizes "interference by one department with the functions of another." *Opinion of the Justices*, 365 Mass. at 641.

The question here is whether a statute that subjects the executive and judicial departments to certain public records requests raises separation of powers concerns—whether, that is, such a statute would "unduly restrict[]" the executive or judicial departments from performing its core functions. I address the potential concerns in respect to each department in turn.

A. Interference With Executive Power

Like the General Court, the work of the executive branch requires space for deliberation—space removed from the public eye. The Governor, for example, has a strong interest in receiving candid and unconstrained counsel in respect to the duties he or she must perform pursuant to Part II, Chapter II, Section 1 of the constitution. At the same time, however, the Supreme Judicial Court has concluded that, unlike the President of the United States in the federal system, the Governor does not possess an executive privilege. *Babets v. Secretary of Executive Office of Human Services*, 403 Mass. 230, 233 (1988), The court was not convinced that the executive could not function effectively without such a privilege, and it noted that the existence of a legislative privilege by virtue of Article XXI, suggested that, "[h]ad the framers … intended to recognize in our Constitution an executive privilege, it is reasonable to expect that they would expressly have created one." *Id*.

Absent the existence of an executive privilege, there seems no Article XXX impediment to subjecting the executive department to certain public records requests. But, notwithstanding its determination that there is no executive privilege under the Massachusetts constitution, the Supreme Judicial Court has recognized that, "[l]ike the Legislature and the Judiciary, the Governor possess incidental powers which he can exercise in aid of his primary responsibility." *Opinion of the Justices*, 368 Mass. 866, 874 (1975). Among these incidental powers is the "broad discretion to select the means he will use in executing a constitutional duty," *id*., which may include "enlist[ing] aid, privately or publicly, formally or informally, as he alone deems appropriate, in performing his official duties. *Lambert v. Executive Director of the Judicial Nominating Council*, 425 Mass. 406, 408 (1997).

It follows, in light of the Governor's authority to seek counsel as explained in *Lambert*, that a statute by which the General Court has determined that the executive branch will be subjected to certain public records requests raises a separation of powers concern—namely, whether statutory authority to make these requests will unduly interfere with the Governor's discretion to "enlist aid" in the performance of his official duties. A statute by which the General Court seeks to subject the executive department to public records requests should be crafted to address any potential to undermine the ability of the executive department to fulfill its constitutional obligations, bearing in mind that, as the Supreme Judicial Court has held, the Governor's constitutional discretion "to select the means he will use in executing a constitutional duty" is "broad." *Opinion of the Justices*, 368 Mass. at 874.

B. Interference With Judicial Authority

Article XXX prohibits the General Court from usurping or regulating the powers of the judicial branch. The legislature, for instance, cannot authorize the re-litigation of cases in which the courts have rendered judgments, or nullify court judgments through legislation. *See Spinelli v. Commonwealth*, 393 Mass. 240, 241 (1984). Such actions have been deemed to "unduly restrict[]" the judicial department from performing its core functions—namely, conducting trials, overseeing litigation, and ensuring the fair and evenhanded administration of justice. Further, the Supreme Judicial Court has acknowledged that the judiciary has the discretion to impose reasonable restrictions on public access to its proceedings. *See New Bedford Standard-Times Publishing Co. v. Clerk, Third District Court of Bristol*, 377 Mass. 404, 410 (1979). Indeed, the legislature has in the past restricted access to certain judicial records, a practice that is constitutional so long as it does not interfere "with the internal functioning of the judicial branch," in which case it "may violate art. 30." *Id*. at 411.

Accordingly, as with the executive department, a statute subjecting the judiciary to certain records request will run afoul of Article XXX should the legislature authorize public records requests that interfere with the court's internal functioning. To the extent a reviewing court views a statute subjecting the judicial department to public records requests as undermining the ability

of the courts to fulfill their constitutional obligations under Part II, Chapter III, of the Massachusetts constitution, the statute as applied is likely to be ruled unconstitutional.

III. Conclusion

In sum, the answers to the questions posed are as follows:

(1) Does Article XXI of the Massachusetts Declaration of Rights provide a basis for exempting the legislature from certain public records requests?

Yes.

(2) Does Chapter I, Section 2, Article 7 of Part II of the Massachusetts Constitution provide a basis for exempting the legislature from certain public records requests?

Yes.

(3) Does Chapter I, Section 3, Article 10 of Part II of the Massachusetts Constitution, provide a basis for exempting the legislature from certain public records requests?

Yes.

(4) Would a statute that subjects the Executive and Judicial branches of the Commonwealth to certain public records requests raise separation of powers concerns under Article XXX?

Yes, to the extent public records requests could be seen as interfering with the functioning of the executive and judicial departments.

APPENDIX A

Massachusetts is at the forefront of Public Records Law and has formed a committee under the premise of enhancing government transparency and streamlining a source of government information to the public. The following appendix (B) provides a comparison of the various different procedures and policies of the majority of the states. The appendix provides information obtained from the National Conference of State Legislatures[2]. "The Act" refers to the *Freedom of Information Act*[3] which is guided by the Department of Information Policy, which is a department under the U.S. Department of Justice.

This information was obtained from the Reporters Committee for Freedom of the Press[4], and gives in depth detail on state legislation as it pertains to public records. The Special Legislative Commission on Public Records took this information into consideration when producing its recommendations.

[2] http://www.ncsl.org/documents/racss/WalkerOpenGovernmentGuide.pdf
[3] Freedom of Information Act (FOIA), 5 U.S.C. § 552
[4] https://www.rcfp.org

Alabama

All legislative bodies are presumptively subject to the Public Records Law, although the Law itself is silent on this point. One trial court has applied the Law to the following legislative officers: *Clerk of the State House and Secretary of the State Senate:* Remote access telephone assignment records. *Birmingham News Co. v. Swift,* CV 88-1390 G (Cir. Ct. of Montgomery County, Ala., Aug. 31, 1988).

Alaska

Subordinate legislative bodies such as school boards and municipal assemblies are clearly covered by the public records law. Records of the Alaska Legislature itself are also public by virtue of legislative rules and statutes. It is possible that legislators would argue the laws and rules are not judicially enforceable, *citing Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987). In that case, the Alaska Supreme Court held that violations by the state legislature of the Alaska Open Meetings Act were "nonjusticiable," even though the OMA and legislative rules expressly required the legislature to meet publicly in accordance with the law. This means the court simply will not entertain disputes over such violations, because of the need to respect the relationship between coordinate branches of government established by the constitution. Would the same reasoning be applied by the courts to duck problems with legislative violations of public records laws? Possibly, though there are good arguments to the contrary.

The *Abood* decision rests on two constitutional provisions. First, the Alaska constitution provides, in Article II, Section 12: "*Rules*. The houses of each legislature shall adopt uniform rules of procedure." This, the Court says, "specifically and exclusively authorizes the legislature to adopt its own rules of procedure." Further, the court found that when, where and how legislators meet and deliberate is a question of legislative rules and that only the legislature can decide whether and how the law should apply to it. This reasoning could be applied to records, as well, since the premise of the court's opinion is that "out of respect owed to a coordinate branch of state government, [the court must] defer to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." 743 P.2d at 337. In this context, however, records and meetings present very different issues. It is less obvious that access to records involves procedural rules. Also, there is no provision in the records laws comparable to AS 44.62.312(f) in the OMA, which — as it was written at the time — would have voided legislation enacted as the result of a process involving open meetings law violations. A different problem is posed by the other ground for the Court's decision — Article II, Section 6, of the Alaska Constitution, dealing with legislative immunity. In essence, it would prevent questioning a legislator, and many legislative aides, about alleged violations of public records laws whether in depositions or in court. This should not be such a major stumbling block in the records context, however, since there will normally be records custodians other than the legislators or their aides. It is different from the situation of a meeting of legislators, when only they know what was said, or who attended. Further discussion of the interesting constitutional issues raised by access to legislative records is beyond the scope of this outline. Reporters should assume legislative records are generally open to the public unless and until it is determined otherwise.

Arizona
(This section is blank. See the point above.)

Arkansas
Records of a "public official or employee" and a "governmental agency" are covered by the FOIA. Ark. Code. Ann. § 25-19-103(5)(A). This definition includes the General Assembly, legislators, legislative committees, city councils, and other bodies with legislative powers. *E.g.*, *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (city council); Ark. Op. Att'y Gen. Nos. 96-123 (county quorum court), 84-091 (legislative committees). The definition might not include advisory bodies. Ark. Op. Att'y Gen. No. 2006-059 (Chancellor Search Advisory Committee). However, a task force that discusses official business of the larger governing body and will provide information upon which the governing body "could foreseeably take action" is included in the definition of a "governmental agency. " Ark. Op. Att'y Gen. No. 2006-194 (HVAC-Plumbing Examining Committee Recommendation Feasibility Joint Task Force).

California
The CPRA does not apply to the State Legislature or its committees. Cal. Gov't Code § 6252(a). Records of the Legislature are subject to the Legislative Open Records Act. Cal. Gov't Code § 9070, et. seq. The Constitutional Sunshine Amendment does apply to the Legislature because it applies generally to "public bodies" and to the "writings of public officials," without excluding the Legislature. Cal. Const. Art. I, § 3(b)(1). The Amendment, however, specifically maintains exemptions and protections for confidentiality of records of the Legislature as provided for by "Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions . . . ." Cal. Const., Art. I, § 3(b)(1). Moreover, in *Sutter's Place v. Superior Court*, 161 Cal. App. 4th 1370, 1382, 75 Cal. Rptr. 3d 9 (2008), the court rejected the argument that the Sunshine Amendment eliminated the mental process principle asserted to protect the motives and thought processes of local legislators (not state legislators), and characterized the principle as rooted in state and federal constitution law, as well as statutory law under the CPRA's Section 6254(k) (incorporating other prohibitions established by law), both of which the court said were expressly prereserved under the Sunshine Amendment. Nevertheless, a constitutional right of access arguably would extend to records of the Legislature not exempt or otherwise protected under existing law.

Colorado
The records of the General Assembly are covered by the Act.

Connecticut
The legislative branch is subject to FOIA. Conn. Gen. Stat. §1-200(1). *See also* Conn. Gen. Stat. §2-23 (copies of bills, resolutions, and records of hearings and proceedings shall be kept at state library for public inspection).

Delaware
Legislative bodies are covered by the Act. However, the General Assembly, or any caucus thereof, or committee, subcommittee, ad hoc committee, special committee or temporary is specifically exempted. 29 *Del. C.* § 10002(c); *News-Journal Co. v. Boulden*, 1978 WL 22024

(Del. Ch. May 24, 1978). For example, the Wilmington City Council is covered. *News-Journal Co. v. McLaughlin*, 377 A.2d 358 (Del. Ch. 1977).

District of Columbia

The Act applies to any "public body," including the Council of the District of Columbia. *See* D.C. Code Ann. § 2-502(18A) (defining "public body" as including the Council).

Florida

Unless the legislature promulgates a contrary legislative rule, the public records law applies to records made or received in connection with official business by legislators. *See* Op. Att'y Gen. Fla. 75-282 (1975) (in the absence of a House or Senate rule to the contrary, Chapter 119 applies to legislative records); Op. Att'y Gen. Fla. 72-416 (1972) (the Legislature may provide by rule for the confidentiality of a report of a special master appointed by the Senate to conduct a suspension hearing until such time as the Senate meets to debate the suspension).
In addition, various statutory exemptions apply to legislative records. *See* Fla. Stat. § 15.07 (1995) (exempting the journal of the executive session of the Senate from disclosure except upon order of the Senate itself or some court of competent jurisdiction); Fla. Stat. § 11.26(1)(2) (1995) (legislative employees forbidden from revealing the contents of any requests for services made by member of legislature).

Georgia

The Act applies to all governmental bodies or other entities that serve a "public function," legislative or otherwise. *See Jersawitz v. Fortson*., 213 Ga. App. 796, 446 S.E.2d 206 (1994) (applying related Open Meetings Act to Olympic Task Force Selection Committee) The Act specifically exempts from its disclosure requirements privileged and confidential official communications with the Office of Legislative Counsel, O.C.G.A. § 50-18-75, as well as certain records related to the provision of staff services to individual members of the General Assembly by the Legislative and Congressional Reapportionment Office, the Senate Research Office, or the House Research Office, O.C.G.A. § 50-18-72(a)(8). Moreover, the Act has been held inapplicable to the General Assembly, "since the Legislature [has] historically exercised the authority to adopt its own internal operating procedures, and [has] subsequently adopted [procedures] inconsistent with the Act." *Fathers Are Parents Too v. Hunstein*, 202 Ga. App. 716, 717, 415 S.E.2d 322 (1992), *citing Coggin v. Davey*, 233 Ga. 407, 410-11, 211 S.E.2d 708 (1975).

Hawaii

The State Legislature is subject to the UIPA, but Section 92F-13(5) provides an exception for "[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to Section 21-4 and the personal files of members of the legislature." Legislative rules provide that committee reports (as opposed to drafts) are public records.

Idaho
The definition of "state agency" in the Public Records Act also includes all legislative bodies. Idaho Code § 9-337(14). The records maintained by officers of all legislative bodies, except as expressly provided otherwise by law, are open to the public.

Illinois
Public bodies whose records are subject to the Act include legislative bodies. *See* 5 ILCS 140/2(a). It should be noted that records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents are exempt from disclosure if those records are in the nature of preliminary drafts, notes, recommendations, memoranda and other records *in which opinions are expressed, or policies or actions are formulated*. 5 ILCS 140/7(1)(f) (emphasis added).

Indiana
Unless covered by a specific exemption, all records of legislative bodies are subject to the Act. Ind. Code § 5-14-3-2. However, in a bizarre decision, the Indiana Supreme Court has held that separation of powers considerations prevent the courts from enforcing the access statutes against the Indiana General Assembly. *State ex rel. Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993).

Iowa
Similarly to how executive branch records are treated under the law, no provision is made in the statute for exclusion of records in the custody of legislative bodies or the courts. "It is the nature and purpose of the document, not the place where it is kept, which determines its status." 79 Op. Att'y Gen. 19, 20 (Oct. 9, 1979). *Des Moines Independent Community School District Public Records v. Des Moines Register & Tribune Company,* 487 N.W.2d 666, 670 (Iowa 1992) ("The nature of the record is not controlled by its place in a filing system."). *But see, Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491, 503 (Iowa 1996) (Senate decision to keep the records in question (long distance telephone records) confidential falls within the constitutionally granted power of the Senate to determine its rules of proceedings under Iowa Const. Art. III, § 9).

Kansas
Legislative bodies are subject to KORA. *Id.*

Kentucky
The General Assembly is not exempt from the ORA. "The General Assembly did not exclude itself from the Open Records Act, but made the Act binding upon itself by defining the term public agency to include 'any body created by state or local authority in any branch of government.'" 98-ORD-92 (*citing* Ky. Rev. Stat. 61.870(1)(g)). "Every state or local legislative board" is a public agency under the ORA. Ky. Rev. Stat. 61.870(1)(c).

Maine

Records of the Legislature itself are subject to the Freedom of Access Act, but legislative papers and reports, working papers, drafts, internal memoranda, and similar works in progress are not public until signed and publicly distributed in accordance with rules of the Legislature. 1 M.R.S.A. § 402(3)(C).

Maryland

The PIA applies. The records of all units or instrumentalities of State government or of a political subdivision of the State concerning the affairs of government and the official acts of public officials and employees are subject to the PIA. *See* §§ 10-611(g), 10-612(a), 10-601, 10-604. The public record statute pertains whether the document was created or merely received by the instrumentality. § 10-611(g)(1)(i)

Michigan

Agencies, boards, commissions, or councils in the legislative branch of the state government are included in the FOIA's definition of "public body." Mich. Comp. Laws Ann. § 15.232(d)(ii). State legislators themselves are exempted from its provisions. 1985-86 Op. Att'y Gen. No. 6390 (1986).

Minnesota

The legislature was crafty enough to draft the Act so that it did not apply to the legislature. However, in 1993, as a result of a controversy over personal use of long distance telephone cards, the legislature passed legislation rendering certain records, including telephone records, public. § 10.46.

Mississippi

Legislative records are covered by the Act, but an ambiguous section retains for the legislature "the right to determine the rules of its own proceedings and to regulate public access to its records." § 25-61-17.

Missouri

Legislative bodies are subject to the Sunshine Law. Mo.Rev.Stat. § 610.010(4) (definition of "public governmental body" includes any legislative governmental entity created by the constitution, statutes, order or ordinance).

Louisiana

Legislative bodies are covered by the statute. La. Rev. Stat. Ann. § 44.1. *See Times-Picayune v. Johnson,*645 So. 2d 1174 (La. App. 4th Cir. 1994), *writ denied,* 651 So. 2d 260 (La. 1995) (individual legislators are "custodians" of nomination forms for legislative scholarships to private university). In *Copsey v. Baer*, 593 So. 2d 685 (La. App. 1st Cir. 1991), *writ denied*, 594 So. 2d 876 (La. 1992), however, the court held that the legislative work files related to two bills from prior sessions of the Louisiana legislature were privileged from public records disclosure under the legislative privileges and immunities clause of the Louisiana Constitution, Article III, § 8. The court found that the "demand for legislative files in this case calls for an inquiry into the motivations behind the preparation and introduction of legislative instruments into the Louisiana Legislature. . . ." *Id.* at 689.

Massachusetts

Records of the Legislature are exempt. G.L. c. 66, § 18; *Westinghouse Broadcasting Co. v. Sergeant-At-Arms of Gen. Court of Mass.,* 375 Mass. 179, 184, 375 N.E.2d 1205 (1978) (telephone billing records of Legislature not "public records" subject to disclosure, because Legislature is not "agency, executive office, department, board, commission, bureau, division or authority of Commonwealth). "Massachusetts, the birthplace of American democracy, is one of fewer than 20 states with virtually no requirements that legislators discuss government business in public," the *Boston Globe* noted after the Legislature passed a $30.6 billion budget that had been negotiated "almost entirely in secret, with six lawmakers meeting for 24 days of talks that were off limits to taxpayers. Debates, agendas, and even the times and locations of the meetings were held in strict confidence. No minutes were kept." N. Bierman, "Legislators' Vital Work Veiled from Public's Eye," *Boston Globe* (July 8, 2011). The article said "[i]nformation blackouts are treated with an almost religious reverence" by legislators, who declined to discuss their deliberations "out of what they term 'a respect for the process.'" *Id.*

Montana

The Public Records Act does not specifically exempt legislative records. Further, the Montana Constitution, Article V, § 10(3), requires that "(t)he sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." Although no court has addressed legislative records, this constitutional mandate for open meetings coupled with the lack of exemption on legislative branch records all lean in favor of openness.

Nebraska

The definition of public records above appears to include records of legislative bodies as well. Neb. Const. Art. III, § 11, however, provides "the Legislature shall keep a journal of its proceedings and publish them (except such parts as may require secrecy)." The Legislature has taken the position that the exemption for "Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature" prohibits access to telephone records even by the State Auditor.

Nevada

The statute does not distinguish legislative bodies from any other governmental entity. See N.R.S. 239.005.

New Hampshire

The Statute's definition of "public body" covers "[t]he general court [i.e., the New Hampshire House and Senate] including executive sessions of committees; and including any advisory committee established by the general court," as well as "[a]ny legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto." Nevertheless, in *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276 (2005), the Court held that the Statute did not apply to a House and Senate conference committee on a bill concerning school funding. "[W]e hold that the public interesting in

protecting the legislature's prerogative to set its own procedural rules and engage in free and frank debate significantly outweighs the public's right of access to the contested negotiations." *Id.* at 295. The Court also held that whether the defendants had violated the Statute was "a non-justicable political question." *Id.* at 287. The plaintiff, a member of the House, claimed that the closed conference committee proceedings violated the Statute. *See also, Union Leader v. Speaker,* 119 N.H. 442 (1979)(Statute does not require disclosure of tape recording made by the House of Representatives).

New Mexico

The Legislature is generally subject to the Inspection of Public Records Act. §14-2-6(E), NMSA 2011.

North Carolina

Most records of legislative bodies are covered by the law, but a separate statute allows legislators to maintain the confidentiality of their requests to the legislative staff for information or drafting assistance. G.S. § 120-129. The Attorney General has opined that correspondence sent to legislators by their constituents is public.

Oregon

The records of legislative bodies other than the state legislature are subject to inspection under ORS 192.420 and the definitions of ORS 192.410(3). The state Legislative Assembly is not subject to the Public Records Law. ORS 192.410(5); s*ee also* ORS 171.405 (no requirement to keep records of acts of legislature other than enrolled laws and joint resolutions themselves) and ORS 192.005(5)(a) and (6).

Rhode Island

Subject to the APRA. R.I. Gen. Laws § 38-2-2(1) (1999)

South Carolina

"Memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs" are exempt from disclosure, but the exemption is not to be construed to limit public access to "source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information . . . and not specifically exempted by any other provisions." S.C. Code Ann. § 30-4-40(a)(1). Other than this "working papers" exception, other records of the General Assembly are subject to the same provisions as other public records.

South Dakota

Legislative bodies are included as a "branch" of the state. SDCL § 1-27-1.1.

Tennessee

The joint legislative services committee has sole authority to determine whether any member of the public may be permitted access to the legislative computer system in which confidential information is stored or processed. T.C.A. § 3-10-108(a). Direct access to such a computer may not be permitted unless protection of any confidential information is ensured. § 3-10-108(b). No information available in printed form may be obtained from the legislative computer system pursuant to the Open Records Act. § 3-10-108(c). A legislator's e-mail is subject to the Act if it

was made or received in connection with the transaction of official business. Op. Atty Gen. No. 05-099 (June 20, 2005).

New Jersey

A government record shall *not* include information received by a member of the Legislature from a constituent or information obtained by a member of the legislature concerning a constituent, including but not limited to, information in written form or contained in any e-mail or computer database, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit.

A government record shall also *not* include any memorandum, correspondence, notes, report or other communication prepared by or for the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly accessible report that is required by law to be submitted to the Legislature or its members.

See N.J.S.A. 47:1A-1.1

New York

Records of the New York State Legislature are subject to FOIL under a separate provision of that law which delineates the specific records which are subject to public inspection and copying. N.Y. Pub. Off. Law § 88 (McKinney 1988). The "State Legislature" is defined by FOIL to mean "the legislature of the State of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof." N.Y. Pub. Off. Law § 86(2) (McKinney 1988). *See Polokoff-Zakarin v. Boggess*, 62 A.D.3d 1141, 879 N.Y.S.2d 244 (3d Dep't 2009) (holding that the State Senate must disclose Senate employee's time and attendance records as they are included in the list of records that must be disclosed under 88 (3)(b));*Weston v. Sloan*, 201 A.D.2d 778, 607 N.Y.S.2d 478 (3d Dept. 1994), *modified* 84 N.Y.2d 462, 643 N.E.2d 1071, 619 N.Y.S.2d 255 (granting access to facts and figures memorializing the expenditure of public funds for legislative printings and mailings, but denying access to copies of newsletters and information targeted mailings). Local legislative bodies are governmental entities within the definition of "agency" and thus subject to FOIL. *See generally King v. Dillon*, No. 20859/84 (Sup. Ct., Nassau County, Dec. 19, 1984) (granting access to minutes of village board meeting); *Malman v. Supervisor (Town of Islip*), No. 7361/81 (Sup. Ct., Nassau County, Aug. 20, 1981) (granting access to resolution passed by Town Board).

North Dakota

All legislative bodies are covered by the open records law. However, it is worth noting the following records, regardless of form or characteristic, of or relating to the legislative counsel, the legislative management, the legislative assembly, the House of Representatives, the Senate, or a member of the legislative assembly are not subject to the law: records of a purely personal or private nature, records that are legislative council work product or legislative council-client communication, records that reveal the content of private communications between a member of the legislative assembly and any person, and (except with respect to a governmental entity determining the proper use of telephone service) records of telephone usage that identify the

parties or list the telephone numbers of the parties involved, except records distributed at open meetings. N.D.C.C. § 44-04-18.6.

Ohio

The language of the statute is broad enough to encompass all legislative bodies. The Ohio Supreme Court has not yet applied the statute to Ohio's General Assembly. The court's recognition that the constitutional doctrine of separation of powers may inhibit the statute's application could mean that separation of powers bars the statute from applying to certain internal records of state legislators. *See State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 75 Ohio St.3d 31, 661 N.E.2d 187 (1996).

In the meantime, the General Assembly has immunized certain classes of its internal legislative records from the Public Records Act, specifically records that arise out of the relationship between legislative staff and a member of the General Assembly but are not filed with the clerk of the General Assembly, presented at a committee hearing or floor session (for amendments to bills or resolution or a substitute bill or resolution), or released/authorized to be released to the public by the member of the general assembly. Ohio Rev. Code § 101.30.

Oklahoma

Records of the legislature or of individual legislators are not subject to the Act except for records kept and maintained on receipt and expenditure of any public funds reflecting all financial and business transactions relating thereto. 51 O.S. § 24A.3.2. However, a copy of a written or electronic communication "created by" a third-party public body or official and sent to a legislator would be a record of the creating public body or official subject to the Oklahoma Open Records Act in its custody, control or possession. A written or electronic communication from a legislator sent to a third-party public body or official would become a "record" upon being "received by" the public body or official and thereby become subject to the Act in the custody, control or possession of the third-party public body or official. 2008 OK AG 19. Records of expenses incurred by employees of the Legislature in the performance of their official duties or authorized actions which are reimbursed by the Legislature are public records. 2008 OK AG 19.

Vermont

There is no case law negating the statute's apparently broad application to all "branch[es] or authority of the State." An early opinion of the Attorney General expressly holds that the companion public meetings law applies to legislative committees. *See* 1966-68 Op. Atty. Gen. 101.

“The doors of the House in which the General Assemble” Vt. Const. Ch. II, § 8.

Virginia

Working papers and correspondence prepared by or for members of the General Assembly or the Division of Legislative Services are exempted from disclosure. Va. Code Ann. § 2.2-3705.7(2).

Washington

The Washington State Supreme Court has not decided whether the Public Records Act applies to all records of the legislature. *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981). The Act does apply to administrative records of the Clerk of the State House of Representatives and of the Secretary of the Senate. RCW 42.56.100.

Wisconsin
Legislative records are not exempt.

Wyoming
All public records of the legislature should be subject to the Act. Wyo. Stat. § 16-4202(a) (1977, Rev. 1982).

Pennsylvania
The Act applies to "legislative agencies." This "includes any of the following: (1) The Senate. (2) The House of Representatives. (3) The Capitol Preservation Committee. (4) The Center for Rural Pennsylvania. (5) The Joint Legislative Air and Water Pollution Control and Conservation Committee. (6) The Joint State Government Commission. (7) The Legislative Budget and Finance Committee. (8) The Legislative Data Processing Committee. (9) The Independent Regulatory Review Commission. (10) The Legislative Reference Bureau. (11) The Local Government Commission. (12) The Pennsylvania Commission on Sentencing. (13) The Legislative Reapportionment Commission. (14) The Legislative Office of Research Liaison. (15) The Legislative Audit Advisory Commission. "." Section 102.
Legislative agencies are required to provide access to "legislative records" as set forth in the Act. Section 303.
The old act did not apply to the legislative branch of state government. *See Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).

Texas
The legislative branch of state government and any governmental body created by it is subject to the Act, which exempts certain categories of information pertinent to the legislature. Drafts or working papers involved in the preparation of proposed legislation are excluded from the Act. Tex. Gov't Code § 552.106.*See* Tex. Att'y Gen. ORD-380 (2003) (certain information related to proposed adult entertainment business licensing ordinance excepted from disclosure because it reflected internal policy judgments, recommendations, and proposals).
Private correspondence or communications by an elected office holder, the disclosure of which would constitute an invasion of privacy, are excepted from the Act. Tex. Gov't Code § 552.109. This exception applies only to correspondence sent out by the official, not to correspondence that is received by the official. In addition, this exemption only protects the privacy interests of the public official. *See* Tex. Att'y Gen. ORD-473 (1987). It does not protect the privacy interests of the person discussed in the communication or the privacy of the recipient of the communication although it may be appropriate to redact the parties' names such as those of students and parents under related statutes. *See* Tex. Att'y Gen. ORD-332 (1982).
Certain records of communications between citizens and members of the legislature or the lieutenant governor may be confidential by statute. § 552.146. Exempt correspondence includes handwritten notes on a personal calendar. *See* Tex. Att'y Gen. ORD-145 (1976).
An itemized list of long distance calls made by legislators and charged to their contingent expense accounts is not excepted because such a list is not a "communication." *See* Tex. Att'y

Gen. ORD-40 (1974). *See also*Tex. Att'y Gen. ORD-636 (1995) (cellular billing records are generally considered public information).
Section 552.111 exempts from disclosure interagency or intraagency memoranda or letters that would not be available by law to a party in litigation with the agency.

Utah

Legislative bodies subject to GRAMA include "the Office of the Legislative Auditor General, Office of the Legislative Fiscal Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative committees." Utah Code Ann. § 63G-2-103(11)(a)(ii). GRAMA also extends to any "office, agency, board, bureau, committee, department, advisory board, or commission" of the above-named entities if the office, agency, board, etc. "is funded or established by the government to carry out the public's business." *Id*. § 63G-2-103(11)(b). GRAMA does not apply to "any political party, group, caucus, or rules or sifting committee of the Legislature." *Id*. § 63G-2-103(11)(a)(ii). However, the Legislature and its staff offices are not subject to GRAMA's fees or appeals provisions. *See id.* § 63G-2-703(2)(a). In addition, all letters of inquiry submitted by any judge at the request of any judicial nominating committee shall be classified as private under GRAMA. *See id.* § 67-1-2.

West Virginia

Records of legislative bodies are subject to the FOIA to the same extent as records of any other public body. In *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), the state Supreme Court invalidated the process by which the Legislature's Conferees Committee on the Budget traditionally prepared an informal but influential budget "digest" setting forth its view of the specific purposes for which general appropriations should be used. The court ruled the contents of the digest must be determined by the Conferees Committee in a public meeting, and the Committee must create and maintain for public inspection "memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest." *Id.*, Syllabus pt. 5.

APPENDIX B

(Committee Hearing Minutes)

The Special Legislative Commission on Public Records
Meeting Minutes
February 13, 2018 1:00PM
24 Beacon St, Room 437 of the Statehouse, Boston, MA 02133

Members Present:

Representative Jennifer Benson, Chair of the Joint Committee on State Administration and Regulatory Oversight; Senator Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight; Representative James Murphy, Senator Paul Feeney, Senator Joan Lovely

Others Present:

Robert Ambrogi, Massachusetts Newspaper Publishers Association; Janet Aldrich, Valley Patriot News; Pamela Julian, Help Students Vote Coalition

Chair Benson opened the meeting by introducing the members present before moving on to agenda item 3, General discussion of Commission's purpose and goals. Chair Benson stated the primary purpose of the Commission is to listen. We're really here to listen and take in all of the input from the stakeholders, both outlined in the legislation and the public, and see where that leads us. This is, I think, a publicly led effort. Listen to the public and have an open and transparent process. After collecting testimony, Commission will review testimony and make recommendations to the Legislature based on testimony received by the end of the calendar year.

Chair Benson then suggested a motion to open future meetings of the Commission to public comment. Senator Timilty motioned for future agendas having public comment. Motion was seconded and motion was approved without discussion.

Chair Benson then moved to scheduling the next meeting and recommended that at the next meeting that the commission would invite testimony from the people and organizations outlined in the law that established the commission. This meeting would take place at the Statehouse in March. Members agreed with this suggestion.

Chair Benson: Future meetings, what are the targeted number of meetings? Where will meetings be held? Considering Commission need to write report, edit, and finalize the report. The pace of meetings and the location of meetings is important, we discussed possibly having each commission member hold a meeting in their district. This would be unwieldy, too many meetings. After holding the initial hearing with invited testimony, the Commission may hold 3 meetings in different regions around the state in order to give most of the state the option of testifying before the Commission. Provide easier access to constituents and other groups not outlined in the law. Lowell, Springfield, Worchester are obvious choice.

Chair Timilty: We can be flexible about the locations, important to ensure access. Regionalization is a great idea, just a question of logistics.

Rep. Murphy: Good idea to ask the public and members of the House and Senate their input on location of meetings. Good idea to have meetings outside the building.

Chair Benson asked if any of the commission members would like to motion to open this meeting to public comment in case anyone present has a suggestion or comment. Rep. Murphy motioned to open meeting to public comment. Chair Timilty seconded the motion. Motion was approved.

Rep. Murphy: Before we get into it, in order to put forward information to this committee, we encourage submission of written testimony, either in person or through email or mail, for people that can't make the meetings.

Chair Benson: Yes and as we do with the [State Administration and Regulatory Oversight] Committee, any written testimony can be directed to the two Chairs and disseminated to the Commission members.

Chair Timilty: Thank you Rep. Murphy for your excellent suggestion. We welcome all collaboration with the public on this topic. We will comply with the Open Meeting Law, and welcome input from the public and the fourth estate and interest groups. Collaboration will make us better at what we do.

Chair Benson: Just to clarify on disseminating information, this would be a one way street. I understand and have worked under the Open Meeting Law. We serve on the Open Meeting Law [Advisory] Commission. It's allowable for public testimony to be disseminated to members, but not to be commented on.

Janet Aldrich: I am Catch of the day video news, Confilm Registry news, Valley Patriot News. I've spent 14 years policing the public record law on Beacon Hill. The public is unaware of how the law works. I thank the Committee for having this hearing. I've covered over 500 hearings and offered committees copies [of video]. I really appreciate Senator Timilty helping many times.

Chair Timilty: Ms. Aldrich, when you egress the hearing room, there is a small lift that will help you with your equipment. I know Rep. Murphy is a very strong and well-conditioned individual.

Chair Benson: Any other questions or comments?

Pamela Julian: We'd like to see a transparent government in Massachusetts.

Chair Benson: Can you please stand and state your name? And if you represent an organization or where you are from?

Pamela Julian: My name is Pamela Julian, I am the founder of Help Students Vote. We promote civic engagement, education, and nonpartisan. Obviously you'd like to see students here, civically engaged, and one way your Committee could lead on this effort and really change our reputation, to be more transparent, open government. Sadly we don't have that. When I explain that to students and teachers they are surprised to learn that, and that's why I am here today, to learn what you have to say.

Robert Ambrogio: I am Bob Ambrogio, executive director of the Massachusetts Newspaper Publishers Association; we've working around open government issues for a long time. I don't plan to testify today

but I hope to do so in the future. Thank you for holding this meeting, in the public, and we are looking forward to working with the Commission.

Chair Benson: Thank you. Anyone else?

Senator Paul Feeney: This is a good first step. I know there is a commitment from you Mrs. Chairwoman, and the Senate chair. Great first step, to have a public meetings, get in the newspapers. As a former selectman and local elected official...there's a lot of us that see the public records law and the good and what it means to open government and to organizations and certainly to the press, and those are the types of things that we'll be discussing as members, but we really want to hear about folks out in communities as well, we want to hear about experiences of trying to gather information from the Legislature.

Chair Benson: Thank you. And I was remiss to say at the beginning, Senator Humason could not be here today because he is in a Ways & Means Committee hearing. Many of our colleagues have other hearings and meetings which is why they may not be able to attend.

The Special Legislative Committee on Public Records
Meeting Minutes
April 4, 2018 10:30AM
24 Beacon St, Room B-1 of the Statehouse, Boston, MA 02133

Members Present:

Representative Jennifer Benson, Chair of the Joint Committee on State Administration and Regulatory Oversight; Senator Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight; Representative Matt Muratore, Representative Paul Donato, Senator Paul Feeney,

Others Present:

Pamela Wilmont, Common Cause; Gavi Wolf, ACLU MA; John Hawkinson, freelance reporter

Senator Timilty opens the Second Hearing of the Special Commission on Public Access to Public Records by introducing his co-chair Representative Benson and the members of the committee, Rep Matt Muratore from Plymouth and Rep Paul Donato from Medford, as well as welcoming the panel of invited groups and shareholders. Asks each panel to stick to a 10-minute limit. Requests that Common Cause come forward [are not yet in the House.] The American Civil Liberties of MA, would you like to come forward or are we going to defer to a later hearing

Gavi Wolf: I think I'll defer to a later hearing

Senator Timilty then calls on Massachusetts Newspaper Publishers Association, with no response.

Rep Benson calls on Gavi Wolf/ACLU MA, suggesting that he comes forward to introduce himself so the record shows that ACLU MA was present for this hearing, and keep track of who was in the room.

Gavi Wolf comes forward, introducing himself as Legislative Director of the MA ACLU, thanking the committee for inviting them to be here. I guess I want to just say that I understand the House is opening its session in remembrance of Peter V Kocot, very fitting… as he authorized this commission. The legislation that has already come in MA, it is a major step forward in terms of transparency and access to information in our government is wonderful. I understand that the charge of this commission is twofold: one has to do with examining whether it would be appropriate and how it would be appropriate to extend the public records laws application to entities that are not currently subjected to public records laws: the legislature, the judiciary and governmental... in particular. The second question before you... how we all can make the workings of the MA legislature more accessible to the general public, and there is a lot to be sad on both of those fronts. As I said I don't have a lot of particulars for you today, but I look forward to sitting with you... and speaking more another time.

Rep Benson: thanks Wolf for recognizing Peter V. Kocot, what he left for us as his legacy is an effort to make government work better for everybody... I share that vision, and it was an honor to come into this

committee after him and carry that on. I also appreciate what I've heard from others about the timely posting of this hearing. We have some constraints through technology and other issues in the house, but I think it's a good option, opportunity to mention that we do now have a twitter account for the Commission itself... so that we can get agenda out there, [and other information pertaining to the activities of the commission] to be more open with the general public... We are listening and working to respond. That is the purpose of this commission, to hear what would make government more transparent, accessible to everyone... Accessibility issues are much better coming from the public and organizations like yours. We're in the building every day and it is hard for us to be objective about what kind information is accessible and out timely for others ... the purpose of this is to make sure that we are hearing and responding to all of these access concerns and ideas. Thank you and we look forward to hearing more from you later

Sen Timilty then echoes Rep Benson and thanks Gavi for acknowledging Kocot's memory... We will be bringing these hearings outside of the building and obviously we welcome any and all input of any member of the general public and all shareholders. Sen Timilty then calls on Ms. Wilmont to come forward

Ms. Wilmont: apologizes for having to delay a more thorough testimony... would also echo the statements regarding Peter Kocot ... in terms of the application issue, it's widely been reported, that we're the only state that doesn't have all of these agencies applied by the public records law. Actually, we did get into the data about public records laws throughout the country... so a lot of public records laws applied to the legislature across the country apply to certain kinds of records and not to all records, and that's because there is a legitimate expectation of privacy for constituent communications... on the other hand, there is data like finances that you can argue can be obtained through certain back channels, but perhaps having a more straightforward process when dealing with that makes a lot of sense... and then there is a side of a much broader mandate of looking at transparency in general.. there are so many different things that fall under that rubric... one of them is the technological side, and then looking at the case... what committee to do in a legislature is very different... some committees release a lot of info, some very little. Some standardization would make sense... Secondly, it is not clear what the cause is, but sometimes the House clerk and the Senate clerk deal with releasing info very differently. She lists examples of discrepancies between House and Senate in terms of what info is released and at what time, concerning certain bills. Looks forward to discussing further at a later time

Sen Timilty and Rep Benson thanks Ms. Wilmont for coming, looks forward to future collaboration

Sen Timilty asks if there are any questions/comments. Asks again for MA Newspaper Publishers Association, no one responds/has arrived. Has been informed that they will not be attending. Asks for MA taxpayers association. Will not be attending. That portion of the public hearing will be closed. Invites public comments to come forward.

John Hawkinson: introduces himself. He's a freelance, local reporter, came to observe, not an expert in how state government/legislative government work. Says he was shocked to discover more about MA public records laws prior to this hearing. I think this conversation needs to be a two way conversation

and that we the public need to hear from you all... it's easy to say it should be just as open as the federal government, or all of these other states... as a neophyte to state government that sounds great, but there are complexities in terms of accomplishing the change or even once the change was made living with it that would make the broad openness really challenging... as a fighter for transparency, what am I up against? are there deep political beliefs that would get in the way of anything, or what are the technical challenges, or the political/legislative challenges. I think it would be helpful to hear what the legislatures think, before we're done with the opportunity to offer our comments. it would help if we could recalibrate our remarks somewhat to the thinking of the legislatures. Then mentions the committee created to investigate the exemption of public records law... thinks its lack of success came from composition of the committee... the legislatures on the committee badly outnumbered the advocates for open governments who sat on that committee, held to the status quo, ultimately recommended the "status quo". Recognizes that that was under different circumstances, but wants to know how to make sure things are different with this committee. Should we narrow [the meeting] on a particular aspect... I don't know what the process is like... but I'm hopeful we can be more transparent and that the committee can give the public a little more guidance as to how the legislature sees the process working so that we can give you the best feedback to inform the discussion... Having a common ground to work from before it gets political would be helpful.

Senator Timilty thanks him, assures him that this is a learning process for legislatures as well as the general public, takes it very seriously, it is a collaboration, we will take it from there and do as much research as we possibly can to educate ourselves.

Rep Benson: It's really interesting that the public perception of what is happening and our efforts not only in this committee but in the legislature can be quite different than sitting on this side of the table, because some of those things that Pam brought, that different committees have different rules that they follow. Deterring this information of bills being released, we struggle with that too, because we are using the exact same system that you are using as the public, so for us to detract from this... A lot of this is technology, and we have been making investments in improving these systems, but as we do that we are finding more and more areas that we would like to expand, to make better. Some of this is a staffing issue with the committees, as the committees decide on their own rules and it’s an extremely democratic process... I have gotten absolutely nothing from above on what this outcome and process should be. We're making this up as we go. We're doing this on top of all of the other work that we're doing. So, what may seem from the public, and I hear this from my district all the time, that there's some grand conspiracy to withhold, when in fact that would take way more work than we're capable of doing... So, we have no funding to create an entirely new online system. so what can we do in our purview to address these issues and try to be more creative? Like the twitter account for the commission, it's one of the things we can put out that doesn't cost anything. I think our effort is to try to break down some of these perception problems and be as transparent as possible... I appreciate your saying that we should have this dialogue, and to understand that we struggle with the same issues that you do. How can we make this process easier for everybody? I will tell you from the outset there are some areas such as constituent privacy issues that we can't cross. We work with constituents on very personal matters, and my fear is there is risk of that becoming public... We often have to ask them

disclosures just so we can work on behalf of them. There are going to be areas we can't open, but I will be honest about that, and tell you why. As long as we can continue that dialogue, and figure out what is pertinent info that needs to be available, how we can make this more streamline for people. Democracy is all about public interaction and being able to participate. We want to make sure that that happens at the level the public deserves and requires, but we have constraints, with privacy and technology, and we'll do our best, but I need to make sure that the public knows that we have no preconceived ideas. We are not tasked by our leadership to do one thing verses another. We are trying to address the issues that were laid out for us in the legislation in a timely and open manner. We are trying to get everything from everyone out in the open, without trying to control that dialogue. It will be messy, we will hopefully get a lot of information, but I think that is the fairest way to do it.

John Hawkinson asks a question, thanking her for her response. Thinks her framing is a very good, one but a bit specific to the legislature, when the charge includes the governor's office and potential changes to records law itself, and there needs to be a different look for other aspects beyond the legislature. the legislatures issues seem be technological, and I don't know if that's it or not. Technological issues can be easy in the sense of - go fix them, or it can be hard if you're actually the one that's going to go fix them, and I imagine you might want to hear from the clerk's office if it's about clerk office issues. I would also offer questions about the status of bills, those are questions that have been making information that is already public, how to make it more accessible. There are also issues with information that is not now public, not universally agreed that it should be public, or is inconsistently public, those are the hard questions. No one has offered a list of what the hard questions are -

Rep Benson: Well that's part of this

Hawkinson: Absolutely. Says it's easy for him to ask what the hard questions are as he's a novice in government, but says that someone has to be the first to ask what the hard questions are.

Rep Benson: not to continue this back and forth, says that that is why they are here devoting a meeting to having different organizations come in and weigh in on the issue, as well as have the administration and other offices present to us as well, because we're not in there, we need to get that info. There is a lot of info gathering before we can start to address those issues.

Hawkinson asks for a timeline

Rep Benson: must be done by December 31st, will be working throughout the summer, next meeting targeting May 4th outside of State House, then June in the State House.

Sen Timilty: our work product in large part is aided by public input, and people who have a great deal of interest, this is a work in progress, and the more input will be receive the better product we will deliver. Thanks Hawkinson, looks forward to more collaboration with many groups/individuals. Asks committee for any questions/comments. Thanks the committee members. Asks for any additional public comments, questions, statements. Reiterates dates for next hearings. Asks for motions to adjourn, adjourns second hearing.

The Special Legislative Commission on Public Records
Meeting Minutes
May 4, 2018 11:00AM
Sharon Adult Center & Council on Aging
219 Massapoag Ave, Sharon, MA 02067

Members Present:

Representative Jennifer Benson, Chair of the Joint Committee on State Administration and Regulatory Oversight; Senator Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight; Representative Matt Muratore, Representative William Galvin, Representative Michael Moran, Representative James Murphy, Senator Paul Feeney.

Others Present:

Mary Connaughton, Pioneer Institute; Robert Cutler, Foxborough Town Clerk, Executive Board Massachusetts Town Clerks Association

Senator Timilty opens the Joint Commission on Public Access to Public documents by thanking everyone for their presence on behalf of the other members of the committee. The first order of business is a moment of silence, for which Senator Timilty asks everyone to stand, for Representative Chris Walsh. Introduces co-chair Representative Benson, Senator Paul Feeney from Foxborough, Representative Galvin, and the other members who will arrive shortly after. Requests invited guests come forward to share their testimonies. Senator Timilty welcomes Representative Muratore from Plymouth comes for his presence.

Senator Timilty calls on Ms. Connaughton from the Pioneer Institute to come forward.

Mary Connaughton: Thank you very much. I am very excited. I especially appreciate the moment of prayer for Representative Walsh, as I am from Framingham and he was my state rep and I can just honestly say that the people of Framingham are just really, really grieving for his passing and he was very much respected and a strong member of the community. He was everywhere. So thank you very much for observing his passing. Okay, thank you, Senator Timilty, and Representative Benson, and other members of the commission for the opportunity to present a public comment today. My name is Mary Connaughton and I am the Director of Government Transparency at Pioneer Institute. We, at Pioneer, believe that your mission is important to the Commonwealth and we appreciate the time and consideration that you are putting into this great effort. Massachusetts has a proud history of transparency laws dating back to 1851--as you know. This is a tradition that we should all be very proud of and respect. The purpose of transparency laws is to promote effective, accountable, and responsive government. Engaged citizens are essential to our form of government to thrive over the long-term...According to the Secretary of the Commonwealth, the Founding Fathers of our nation strove to

develop an open form of government on the principles of democracy and public participation. An informed citizen is best equipped to participate in the process; yet, despite this paramount need for the long-term health of the Commonwealth, our transparency laws remain deeply flawed. The Public Records Law expressly states that the law shall not apply to the records of the General Court, meaning that the state legislature exempted itself from this most important law. Although the Supreme Judicial Court upheld the application of the legislature's blanket exemption, it never ruled specifically on the constitutionality of the provisions. We, at Pioneer, believe the legislature's exemption to this law is unconstitutional. The legislature's exemption from Public Records Law undermines the rights deserved to the people in the State Constitution and makes it impossible for citizens to uphold their end of the bargain by being engaged in the democratic process. Our letter to the Commission, which I sent, argues that the Commonwealth is a social compact as it explicitly states in the Preamble to the Constitution. The Preamble also states, "as such, it is the duty of the people to provide for an equitable mode of making laws." So the mode, the lawmaking process, must be reasonable and just, invest the people with an equitable interest in a transparent legislative process. The legislature, therefore, must be accountable to the people. The Constitution is not focused merely on the end result. The means of making law must be equitable and accountable. This is a crucial point. Our Constitution also places explicit limits on the powers of the legislature. Its Declaration of Rights states that the legislature must not pass laws that are repugnant or contrary to the Constitution. Legislatures in their official capacity must be at all times accountable to the people. The courts have not yet interpreted this provision. It also declares that the people have the right to instruct their legislators. Again, this language has not been interpreted by the courts in its decisions regarding Public Records laws. Common sense and fairness require, of course, that transparency is necessary for members of the public to hold legislators accountable and to instruct their legislators. After all, the legislature serves the people and its power is derived from the people, not the other way around. Hiding behind a veil of legislative exemptions defies these clear Constitutional mandates of accountability and deprives the people of their right--and I dare say: their obligation--to effectively engage in the democratic process. In terms of practical considerations that have been bandied about occasionally by certain legislators as reasons for these exemptions, their key argument doesn't hold water. For instance, the protection of sensitive or personal information has been cited as one of these reasons for the blanket exemption; yet, a narrow exception would suffice as it does elsewhere in government. Some might say that the concept of legislative privilege trumps all this. We say "no." The underlying purpose of the privilege is to support the rights of the people by promoting free and open debate in legislature, not by undermining the people. The privilege extends to legal causes of action, not public accountability. Power resides in the people. Pioneer believes that transparency must be pervasive throughout government. The Governor's office should voluntarily become more transparent and open with regards to its records. The 2016 revision to the Public Records Law stated--among other things--that empowered the commission here today was certainly a step in the right direction. But the SJC's ruling in the Lambert case of 1997 still casts a paw over transparency in our state and the Governor's office remains one of the small handful nationwide that claims a blanket exemption from Public Records Law. We believe, as our letter to the governor details, which we also submitted to this commission, that Governor Baker is in a unique position to exercise leadership on this issue. He should suspend the application of Lambert prospectively from executive order--at least in the short term--as the commission considers the long-term solutions. Such an act would not be unduly

burdensome for the Governor's office, especially since Governor's offices across the nation, in many cases, already do this. It would be setting an appropriately high bar to serve as a model for future governors of the Commonwealth. Thank you.

Senator Timilty thanks Ms. Connaughton and opens the floor for questions and comments...Senator Timilty sees none and thanks Ms. Connaughton for coming. Ms. Connaughton thanks him for having her.

Sen Timilty recognizes Representative Michael Moran from Brighton and Mr. Rich Powell, the Chief of Staff for the majority leader in the senate, Senator Cynthia Stone Creem. Sen Timilty asks if the Town Clerk of Foxborough is present and recognizes him.

Clerk Cutler: Thank you for having me today. My name is Robert Cutler. I am the town clerk of the town of Foxborough. I am also on the executive board of the Massachusetts Town Clerks Association. So I am going to tell you today a little bit about our experience as clerks with the new law. We're not going to give our opinion, whether or not it should apply to all of government, but I think from our experience, the new law has had a beneficial effect for transparency in availability of public records. When the Public Records Bill was being debated in 2016, Massachusetts Town Clerks Association was actively working with the sponsors of the bill to allow for the changes that the public were demanding to be made to the Public Records Law while allowing municipalities to continue to provide all of the services that the public is entitled to and expect to receive. The members of the Massachusetts Town Clerks Association recognize we are here to serve the residents and taxpayers of our communities. In many ways, the clerk's office is the window to local government. We are the first office where residents come to for information about a community so we recognize the need for transparency and the availability to information that the changes to public records bill were designed to protect. The new law made some important changes from our own personal experience; it's made the process of obtaining public records clearer for the public. With the creation of the records access officer, it gives a point person for the public to contact. The RAO is responsible to manage the process to ensure that the requester receives the documents that correspond to the request in a timely fashion. The RAO is also instrumental in helping to clarify the request cases of confusion. Another positive change was to encourage communities to put on their websites as much of their documentation as they are able to. In the short term, this has not substantially reduced the number of public records requested but I expect, over the long-term, that would be the effect. As communities evolve with the ever-changing possibilities provided with improved technology, public access to records should be much improved. Although the new law has had some positive effects both for the public and those responsible for managing the process, there are still issues that remain. When the new law passed and the per page was reduced from $0.20 to $0.05, many of the municipal communities lamented the loss of income with many communities finding it more and more difficult to balance their budgets on an annual basis. The realities of the situation are that most communities provide these services every day to the public for little to no cost for the requester. So this change had very little effect for the majority of requests received by municipalities. However, many communities, especially larger ones, have been required to add an employee to act as an RAO without receiving reimbursement for the cost of that person. Also, the law did not provide the protection for municipalities from the serial requesters. Every community has a handful of people who file multiple requests on an annual basis, many of which total several pages for

each file. Also, many requests are actually questions and not requests for documents. That's where the RAO comes in and helps them clarify their request mainly. As an association, our members receive multiple requests a year from private companies looking for information which they turn around and sell. The communities are not allowed to make money off the information but the municipalities are not allowed to charge them for the same information. I would be happy to take any questions you might have.

Sen Timilty thanks the clerk and opens the floor to any questions/comments.

Senator Feeney: First of all, Mr. Clerk, thank you for coming all the way here. I worked with Bob for a lot of years and he does great work down in Foxborough as a clerk. [...] We have 200 legislators, you know. [...] Can you give us an idea on kind of volume and scope? Of how many records you're dealing with? Is it worse at certain points? I mean, how much staff time do you have to devote to it, I guess?

Clerk Cutler: Well, so, you know, each community handles it a little differently. Some have a super RAO who is in charge of the whole thing, some parcel out between departments. The difficulty comes in with the police department and the fire department because they have privacy issues with a lot of their information so they handle most of their requests directly but the RAO, at least in Foxborough, kind of is the manager of the process and is the go-between between the requester and the department. We get hundreds. The police department, the fire department, hundreds, hundreds, hundreds. It's a lot of information. Most of the requests are very basic and don't require a lot of time but there's a lot of research time, especially on the multiple requests. If you're going to go in that direction with the legislature, you're going to have that same problem. There is going to be the person who is going to be responsible for making sure that the private information remains private or redacting documents. That's a huge consideration but transparency is important. Especially today with social media and immediate knowledge and information being parsed out all the time. It's important to make sure that the right information is getting out as quickly as possible.

Sen Timilty thanks Senator Feeney for his question.

Senator Feeney: Thank you, Mr. Chairman. Thank you again for coming out. Just a question on the website. So, you said a lot more information was being put on websites but people are not still getting...are they not getting comfortable with going to the website to find it? Or is there still information not on there that is still being uploaded to get on?

Clerk Cutler: So I think a part of the problem is municipalities are just starting to catch up with all technology and putting documents on, so, because of the time involved, most of it is information that's current, going forward, so historical stuff is not getting to the website yet just because of the time that it takes to do all that. Most communities are not adding additional staff to take care of the backlog so I think to over time, as that continues to grow, people get used to that whole process of going to the website, finding what they need, rather than going to the RAO first.

Senator Feeney: If I may do a follow-up?

Senator Timilty: Please.

Senator Feeney: So, if somebody does come to you and you know it's on the website--

Clerk Cutler: Yeah we refer them to the website.

Senator Feeney: And that's it? Then you're done with it?

Clerk Cutler: Usually, yeah. We refer them to the website and then if they have any additional questions, we handle that. So that part of the process, the management part, has added a considerable amount of time to my office. You also have to track all of the information which has added a considerable amount of time as well.

Sen Timilty: Thank you. Representative Moran?

Representative Moran: Could you give us an example of a name or a type of company that is looking for data that they can then turn around and re-sell?

Clerk Cutler: I don't recall but I know that there was one company that was looking for some voter information--which is public information. Normally, in the past we would charge like $25 for the records but because it's electronic, under the new bill, we are not allowed to charge at all. They then turn around and sell that--maybe similar to the [Cambridge Analytica] situation in the 2016 election. They sell that information. They are able to use it in many different ways and then they sell it off to different companies and charge--I don't know what they charge--but we had one recently that a lot of the clerks got from the same company and it was clearly a charge for the information. We are not allowed to charge at all for that because it's electronic.

Sen Timilty: Sir, what is your current staffing level in your office?

Clerk Cutler: I have myself and two full-time personnel.

Sen Timilty: Depending on--obviously, nothing is preordained with this commission--depending on what we do, in terms of municipal documents, do you anticipate the need for additional staffing in your office?

Clerk Cutler: Actually, so I was at 1 ½ additional staff in anticipation of this and the document management that we're currently doing, I jumped to the full-time. For right now, for me, that works but I know the larger communities, they've added an actual department just to do their tracking.

Sen Timilty thanks the Clerk and discloses that Senator Feeney has raved about the clerk's work in the past. Sen Timilty recognizes Representative James Murphy from Weymouth.

Sen Timilty: Any additional witnesses would like to weigh in or testify...in this edition of the Special Legislative Commission of Public Records? Asks for motion to adjourn, motion is seconded, adjourns meeting.

The Special Legislative Commission on Public Records
Meeting Minutes
July 11, 2018 10:30AM
24 Beacon St, Room B-1 of the State House, Boston, MA 02133

Members Present:

Representative Jennifer Benson, Chair of the Joint Committee on State Administration and Regulatory Oversight, Senator Walter Timilty, Chair of the Joint Committee on State Administration and Regulatory Oversight, Representative Paul Donato, Representative Matt Muratore, Senator Joan Lovely,

Others Present:

Kaila Webb, Pioneer Institute

Chair Benson opened the meeting by introducing the members. She then opened the meeting to the inviting testimony. She then called on Kaila Webb from the Pioneer Institute.

Hello, my name is Kaila Webb. I'm here today as a rising Wellesley College junior and an intern at Pioneer Institute. I'd like to thank the members of the commission for giving me an opportunity to speak, and for their diligent work towards such a vital function of government.

Massachusetts has long set standards for the rest of the country. Our constitution served as a model for the United States. A version of our health care policy is now the law of the land. Our K-12 programs are consistently ranked as the best in the nation. While we've been trailblazers in almost every field, we are failing our citizens in a category integral to the health of the Commonwealth: transparency.

In 2015 the Center for Public Integrity gave Massachusetts a D+ for state accountability, driven in part by F's in public records and lobbying. Since then the Office of the Comptroller has launched CTHRU, Governor Baker signed the new Public Records Law, and this commission was launched. Yet in all of this work, the General Court has remained exempted from public scrutiny. They've given the excuse that allowing constituents to see and hear their representatives clearly would stifle the legislative process.

The Boston Globe counted only 7 states that agree with this reasoning, as most reject such a broad exemption to government transparency. Most states trust their citizens both to understand legislative decisions, and give them the tools to stay involved. Massachusetts must show similar accountability.

Our constitution concurs, reminding that "all power" is "derived" from the people, and that all branches of government -- "legislative, executive, and judicial" -- are at *all* times accountable to them. The constitution makes no mention of an exemption for the General Court or the governor's office. Accountability is impossible without observation, and a citizenry separated from its representatives by opaque excuses is incapable of fulfilling the social compact our Constitution describes.

Thus, Pioneer Institute interprets this exemption as unconstitutional. It's ironic that the founding document of our state mandates legislative, executive, and judicial accountability, yet laws were later

passed to exempt the state Legislature, the judicial branch, and the Executive Office of the Governor from citizen supervision. The writers had great foresight, including in their Declaration of Rights that the legislature must not pass anything "repugnant or contrary to this Constitution." Such an exemption plants a seed of doubt in the citizenry regarding what goes on behind closed State House doors.

Citizens elect responsible and trustworthy men and women into government. They would not give their trust to corrupt individuals, and a request for greater transparency should never be interpreted as suspicion of corruption. Transparency is a necessity, not to oversee our representatives, but the laws they refine and propose.

Greater transparency from the State Comptroller revealed striking misuses of funds in the Department of State Police. The same has happened in many other states, from Maryland to Michigan. In this regard, Massachusetts is no different than any other state. Our representatives too are imperfect, so transparency provides a safeguard for catching what they have missed. The Commonwealth must commit to a clear line of communication from government to the people to preserve the security we all strive for.

The constitution has established oversight as a right of the people, which these exemptions blatantly ignore. Governor Baker could lead a statewide change to reinstate the Commonwealth as a national leader in transparency. He should suspend application of the 1997 SJW Lambert case establishing these exceptions, while this commission explores long-term solutions. With a single action he could strengthen people's trust, assure the accountability our Constitution requires, and give representatives the room needed to craft lasting change.

In 2014, Gallup found that only 58 percent of state citizens trusted the Commonwealth's government. They distrust a system designed by the people of Massachusetts for their "safety, prosperity, and happiness". Anything less than certainty in such a democratic government reveals a lack of trust between our legislature and the people it serves. To restore that trust, we must reveal the good work our representatives do through full transparency, with no exceptions.

Thank you for the opportunity to share these points with you.

Chair Benson asked if any Commission members had any questions, there were no questions. She then thanked Kaila for her testimony.

Chair Benson then asked if anyone from the public wants to make a comment. There was no public comment.

Chair Benson then moved to scheduling the next meeting, saying that the Commission was aiming for September for the next meeting, and hoping that the advocates will be ready to give testimony in September.

The Special Legislative Commission on Public Records
Meeting Minutes
September 12, 2018 11:00AM
24 Beacon St, Room B-1 of the State House, Boston, MA 02133

Members Present: Representative Jennifer Benson, Chair Joint Committee on State Administration and Regulatory Oversight; Senator Walter Timilty, Chair Joint Committee on State Administration and Regulatory Oversight; Representative Michael Moran; Representative Matt Muratore; Representative Paul Donato; Senator Cynthia Creem; Senator Paul Feeney; Senator Joan Lovely

Others Present:

Pamela Wilmot, Common Cause; Gavi Wolfe, ACLU MA; Deirdre Cummings, MASSPIRG; Bob Ambrogi, MA Newspaper Publishers Association; Justin Silverman, New England First Amendment Coalition; Mary Connaughton, Pioneer Institute

Representative Benson: Hello and good morning. Welcome to today's meeting of the Special Legislative Commission on Public Records. I am very excited for today's meeting because we have several groups that we are looking forward to hearing from. We hope to have a very robust and informative meeting today. We will follow similar rules that we have had in the past and we will go in the order of those that have signed up to speak. We ask all contributors to limit their remarks to three minutes. We ask that you do not read any written testimony, and that alternatively, you present any written testimony that we can read to the committee. Senator Timilty do you have any remarks?

Senator Timilty: Well thank you very much, Madam Chair, as you have so eloquently stated, we are excited about today and the work product going forward with the weeks and months ahead and we offer forthwith the weeks and months ahead to listen to the input from those parties that have a vested interest in this very important issue. We do not pretend to be experts on this important issue and we welcome any and all input not just from the people in the room but going forward from the general public. That being said, we are ready to go.

Representative Benson: We have a group consisting of Gavi Wolf, Pam Wilmot, Deirdre Cummings, and Bob Ambrogi.

Pam Wilmot: Good morning Madam Chairwoman and Mr. Chairman. Thank you so much for your forbearance waiting for us for so long. As you well know, at the end of the session gets very, very tight for our organizations involved as for you. We really wanted to put a lot of thought into this and wanted to put together an in-depth that it deserves. Our organizations: Common Cause, ACLU Massachusetts, MassPIRG, Mass Newspapers Publishers Association are some of the leading groups in the Massachusetts Freedom of Information Alliance. We were part of the campaign that lead the Public Records Law update in the session before last that included the charge for this Commission. We met five times. We talked about what we wanted to put forward to you. I believe that you have both an e-mail copy and a hard copy of our written testimony which essentially goes through each of the charges that

are contained in the mission of this taskforce. It's very voluminous and detailed but that is what we felt we owed you given the timeframe and also the charge of this commission. But we wanted to focus today on three main priorities.

Common Cause is an organization that was founded in 1970 and has been pushing for openness and transparency for the duration for many of the public records laws across the country, including improvements and updates to the Freedom of Information Act. So this is a very important subject to us, so we really appreciate the seriousness in which you have approached this.

It is not an easy topic. It is both difficult from the inside and from the outside, in that the public has come to expect a greater and great level of transparency. That is the world that we live in today. Yet sometimes our public institutions have difficulty adapting to that. As you are thinking about this, we would like you to see us as a resource.

There are a number of different areas in the charge but of our three top priorities, the first are about committees. Committees are where the public interfaces with government. Therefore it's critical to provide access to them.

Deirdre Cummings will talk first about our first priority which is the scheduling of hearings and the notice thereof. The second priority is about kinds of information that's available from the committees as they do their work, which is also critical.

The third priority is about the application of Public Records Law and some of the exclusions from there and how we might expand that coverage to the Judiciary and the Governor's office and to the Legislature, and do so in a responsible manner.

Deirdre Cummings: Thank you members of the Committee. My name is Deirdre, I'm the Executive Director of MassPIRG. MassPIRG is a 45-year-old nonprofit, nonpartisan public interest organization. We have been working to promote civic participation and government transparency for the last 40 years.

A number of us here at this table spent some time 12 years ago convincing both the Legislature and the administration that would in fact put all state spending online and make that transparent and easy to find and use. It would allow the public to participate and even find inconsistencies or waste. 12 years later, what started as "open checkbook" is now called CTHRU. That is night and day from where we started. You used to have to know secret codes in order to figure out what we were spending. People had to go to different agencies to figure out what that was. Well it's not all wrapped up on one site, and it's fairly easy to use. Is it 100% perfect? It's not. At the time, if we had let that slow us down…there were a lot of reasons not to do it. More importantly, the Legislature, and the administration said yes, this is a priority and we didn't let those small things get in the way. We may not get the perfect product in the first year, or in 10 years, but it will be way better then what we started with. I am so pleased to participate in this hearing today.

Really we just wanted to focus on this section on legislative hearings. There are a couple of recommendations that we had come up with, thinking about hearings from the point of view of the

public. The Legislature is holding public hearings. That means that there is merit for the public to participate, whatever way they would like. They may want to testify, they may want to show up in order to see what is going on, or see who else is testifying. So we had a number of recommendations in this area that would allow for more participation from the public.

The first was to come up with a preliminary hearing calendar. That means that by April 1 of the first year of the legislative session that all committees should put out their whole hearing schedule for the session, by issue. Now it does not have to be that complicated. It does not have to be that each committee includes every bill that will be heard. But if we knew, for example, that the Committee on Environment on this day would hear issues around drinking water and on this day the Committee would hear issues on toxic chemicals. Some committees do this, but isn't as in advance as by April 1. Putting it out ahead of time would help the public plan.

Second, that all specific committee hearings, that the bills to be heard on that day be given at least two weeks advance notice. Again, it gives the public more opportunity to participate. Then in scheduling the length of the hearing, there was a lot of debate amongst us as to how to do this. We've all been to hearings where we want the public to participate, but there are too many bills being heard on that day. Because the hearing is so packed, it's almost impossible for everyone to have a meaningful opportunity to participate. We think it would be a smart recommendation that hearings should last about four hours. We understand that committee Chairs probably understand how much attention each bill will be given. For example, there are some bills that may take longer and some hearings where you may only want to hear one bill. We understand that it is impossible for the committee to ask testifiers to come back day after day.

We think that would help solicit more public participation in a meaningful way. So those were our primary recommendations around… [inaudible] We suggest a two week public notice rule but there should be exemptions to that. For example late filings or illness or weather issue. So, there is room for exceptions to that two week notification.

Gavi Wolfe: It falls to me to talk about the materials we hope committees might make available to the public. We are thinking about three different categories of materials that you might contemplate. One is public testimony, second is committee votes, and third, for bills that are given favorable reports, summaries of the legislation.

One of the things that we talked a lot about was the importance of – the public records process is one where individuals make requests of people who hold government documents. But we talked a lot about how this facilitates the communication of [inaudible] to have information proactively, affirmatively published. So one of the things that was built into the public records reform was not only information about how the public records law works, but, very specifically, certain documents ought to be made public online. That streamlines the process for everybody. People who hold those documents don't have to receive requests for them, and can just simply say it is right here. And for people who are looking for information don't have to reckon where to find it and is it available. That's the spirit behind these recommendations as well.

The idea here is helping people understand the workings of the committee. The perspective of many members of the public, when they are interested in a particular bill and that they know that it is going to a particular committee, it's often the case that the process, aside from the momentary open door of the hearing, is a black box kind of process. There is a bill, there is a hearing, and you might get a little bit of a window into what people have to say and what are some of the questions arising from the bill. If you are not at the hearing you miss all of that. Then some time down the line, the bill will get a report. The nature of that report is very limited. Basically, the nature of that report is that the bill will go to study, it ought not to pass, or it is given a favorable. But that is really all the information that is affirmatively provided to the public. Sometimes, there is information provided through the press or otherwise about votes cast. It would be enormously helpful and a great benefit to the public to understand more about what the process looks like.

The first thing we think would be helpful to put online would be information about testimony. There are two different pieces to that. One is who shows up to testify at a hearing. A simple list of the folks who testified including their affiliations, their positions on the bills. The second piece is the testimony itself, is the written testimony provided to the committee.

I am definitely mindful that members of the committee might be a little disappointed in what we are saying here because this isn't radical. We are playing catchup to some other states. I did an informal survey of other states and their ACLU affiliates. I reached out to my other counter parts and asked them: "How does it work there?" While I am very cognizant of differences, I was struck by the fact that most of the other states either publish written testimony in full, or publish a list of folks who testified.

In most of the other states I heard back from, the information was that the votes of the committee was part of the official report. Also the vote count and who voted which way and whether or not those committee members voted to send the legislation to study.

The last thing that I think is worth talking about is what other information a committee could provide to the public, when it is voting out a bill favorably. We often see that Ways and Means committees will put out some sort of material that describes the legislation. That would be helpful information from all committees. In particular if there are amendments that are made by the committee, then an explanation of those amendments.

Some states go far further in what they provide to the public. If you look at a page for a particular piece of legislation on the California website, you will see that the legislation itself tracks exactly how it would change the underlying statute – it has "strike-throughs", it has underlines to show what is being added to the statute. That is very helpful. It would be very helpful to see similar information coming out of the committee. These are the ways that we are changing the legislation, and how it was passed through our committee.

I think I'll stop there, but I look forward to talking more.

Bob Ambrogi: Good morning, I am Bob Ambrogi. I proudly represent the failing newspaper industry. The Mass Newspaper Publishers Association has also been lobbying for transparency and working for

transparency in this state for many years, since 1972. What I am going to talk about this are some recommendations regarding possible statutory changes.

In 2015, the Center for Public Integrity, which is a Washington D.C. based organization, rated all states regarding their transparency laws, and they gave Massachusetts a big F on its public records laws. The reason they did that was because Massachusetts is one of the few states that give a blanket exemption to the judiciary, the Legislature, and the Governor's office. That was the specific reason they cited. There have been changes since then but that basic fact has not changed. This Commission has a unique opportunity to…give us a better score, at least.

So what I want to do is talk about each of those three issues a little bit. Starting with the Governor's office, Massachusetts is one of only two states in which the Governor claims a blanket exemption from the public records law. The other state is Michigan. Last year, the Michigan House voted unanimously to revoke the exemption. It did not pass the Senate. Michigan is currently in a gubernatorial race and all of the candidates have vowed to open up their offices to public records requests if they are elected. If that happens, Massachusetts would be the only state where the Governor has this kind of exemption.

It's not really clear from the statute itself why the Governor is exempt. If you read the definition of public records it would appear to apply to the Governor's office. There was a 1997 SJC case called *Lambert vs. Judicial Nominating [Council]*, the SJC ruled in that case that the Governor did not have to provide certain records. It was a confusing case in that they did not provide a clear reason as to why the Governor did not have to provide the information requested. Every Governor since then has claimed that exemption. We're suggesting legislation that would change that.

In our testimony we have a very clear recommendation that really just changes the definition of a public record. It makes explicit that that it would apply to the Governor's Office in the same way that it is applied to any other executive office of the Commonwealth. The same exemptions and rules would apply. There is no constitutional issue here. The SJC has said that the Legislature could choose to do this. The Governor himself has spoken to our organization and said that if the Legislature were to change the rule that he would respect and abide by that. Even last year the Attorney General issued an opinion that this special commission may well be considering and changing this issue. So we are recommending that the Governor be included under the public records law expressly.

With regard to the Judiciary, we are bifurcating between adjudicatory records and administrative and financial records. The law around adjudicatory records is well established under both constitutional and common law. Most judicial records throughout the United States are open to the public. There are, of course, exceptions. These exceptions are well defined by judicial decision. We are not suggesting any changes there. However, the law does not address the question of administrative and financial records. We believe strong right of access to the financial and administrative records of the judiciary. Everything from contracts, internal audits, financial records, all of that is information the public should be able to have access too.

We are actually proposing legislation that would create a new definition of a certain kind of record that would be a judiciary financial and administrative record. It basically says that any record in any form

pertaining to the management, supervision, administration, or finance of the Supreme Judicial Court, the Appeals Court, the Trial Court, including any Court department, the Office of the Commissioner of Probation, the Office of Jury Commissioner, and the office of any court clerk, but not including adjudicatory records.

It is actually consistent with an informal policy the Court adopted this year. The court itself did a study of opening access to its records to the public and it hasn't adopted a formal rule on this, although it does have a rule on adjudicatory records. On its own administrative records, it has adopted a policy which basically does the same thing; it allows the public to make requests for certain kinds of financial and administrative requests. We believe that that should be made clearer and permanent in the form of legislation rather than relying on an informal policy of the Court.

Finally with regards to the Legislature itself, we have talked about a number of recommendations regarding rules changes that the General Court could adopt to provide greater access to certain kinds of materials. But we are further proposing that the Legislature define certain records that would, as a matter of course, be available to the public. We are proposing as legislation, as a change to the Public Records Law. If it were to be addressed through rule, that could be another way to get at it. What we've done is create a fairly long list of specific records that don't get into the kind of deliberative process so much, but deal more with financial records, audit reports, certain kinds of communications within the Legislature.

It would essentially create another new definition in the Public Records Law, something called a legislative record. It would give the public the right of access to request those kinds of records. That's in a nutshell the three areas in which we're recommending statutory changes.

Benson: Thank you and before we get to a conversation, I want to thank Sen. Feeney for joining us. So, let's have a talk. How about some questions?

Senator Creem: So I just want to clarify, one thing, with regards to people who testify, it would not be the recommendation of the committee to summarize someone's testimony in writing, because I have some concerns regarding cases that have testimony?

Wolfe: That was not a recommendation. Once we start interpretation that could end up with: "That's not really what I meant or what I said."

Creem: So the committee would say no written testimony or something along the lines of its just not written?

Wolfe: Right, they would list the fact that someone testified, their affiliation if any, and their position.

Creem: I just wanted to be clear, as that gets us into some troubles.

Wolfe: I know that some states audio record all of their committee hearings and that they provide transcripts or they have audio recordings available in an archived fashion so people can then listen to

the actual testimony and they themselves can hear the words. That would be a different matter. That would be valuable tool or resource.

Wilmot: That was on our list of recommendations that were a little lower on the list. But you do have a lot of technology in the hearing rooms that you did not have before so that could be theoretically possible.

Timilty: If I may, Madame Chair…

Benson: Yes, please.

Timilty: Ms. Cummings, I was wondering if we could touch upon your suggestion that we have four-hour limits for hearings?

Cummings: Yes.

Wilmot: It is a guideline, not a rule, not a limit, just a guideline.

Timilty: Forgive my use of a baseball metaphor here. I often say a hearing is like a baseball game, there is no clock. And I know this committee and every single member of this committee want people to be heard. We can be put in the unenviable position of shutting down the hearing on what may be a very controversial issue. I'm just anticipating the arguments that would come our way, that we are silencing people.

Cummings: Yes that was in no way our intention, we wanted to use that as a guideline to get to more of the front end issue, which is to design the hearings such that we don't put so many bills in a hearing that

that would naturally flow to ten hours. So to the extent that we could limit to the extent that we know what is coming up… as to the best guess, to the recommendations of the Committee.

Timilty: So if I many, I understand that neither MassPIRG nor anybody on this panel would seek to silence anybody, but it is a very delicate task for the Chairperson of a committee to navigate that charge.

Cummings: I understand.

Benson: Well, if I can also say that I think we have all been surprised by the amount of testimony we have at these hearings for some bills, and that we have many bills that nobody has come to testify about. It is extremely, extremely difficult to estimate how long a hearing would take. I have been in hearings that have had 25 bills that have lasted 15 minutes. I have also been at hearings regarding one bill that lasted 10 hours. So to put this in a rule or in a law is, to me, unmanageable. It depends on the committee, it depends on the day, and it depends on what else is happening in the world. When you schedule a hearing in April, and the hearing does not happen until November, you can't predict, necessarily what is happening. I have seen this in my own legislation. The Equifax bill is a good example. We filed that back in January, and it wasn't the Equifax bill it was the [inaudible] bill. It didn't become an interesting issue until after the Equifax breach happened. So I have some serious issues with that.

Also, to add on to that, some of the technology constraints that we experience. For example, committees do not have their own webpages that we can add things to, on the Legislature website. So there are some cost issues that we have to estimate on what some of these might cost in changing access points, in training members of committee staff to be able to put this information online. I support many of these recommendations but the logistics of it may take quite a bit of time to implement and those factors are quite simply out of this Commission's control, as far as website management.

Cummings: Actually, can I just comment on that. I will take the second one first but the issue of allowing more people to be empowered to upload data to a system, that is technology that exists and is out there and there is a way to do that. When the state did move to… there are a number of things that came up… there were quasi-public agencies, there was all the Executive Offices, but it turns out that there is a simple way to post information themselves. A&F reported a number of years ago that some of the changes actually saved them money, saved them staff resources; staff were able to look things up themselves and answer questions. I understand there are challenges, but there are technological ways to move forward, and it may take some money no doubt, but it's not an exceptional amount of money.

Benson: The only other thing I will add is that the difference between a government agency and a committee staff is there are only a few staffers for the extra level of training and effort, for a small staff. I have 2 committee staffers. Oh Representative Moran is here, it's trying. We have a much smaller organization to do this type of work.

Cummings: Sure, and we appreciate that.

Wilmot: Thank you Madam Chairwoman, to the first point, we talked about and rejected a formal policy around duration, for that reason. Most committees are great; there are a few examples that have consistently have a really really large number of bills. We see it as an attempt, maybe something for folks to think about during scheduling.

Ambrogi: Can I just speak to the technology issue briefly? We also talked about this among ourselves. One of our recommendations is simply for this Commission to begin to look longer term at what can be

provided on the web, whether recordings of hearings, documents. Not to do this tomorrow, but let's get this moving, maybe in 5 years, start to move the General Court in that direction, maybe not right away.

Creem: I wanted to offer a different perspective to my good friend Senator Timilty. As a former Chair of Judiciary, I am glad you didn't make recommendations [for rules], and as someone who is progressive on this issue, I think we need to limit the time that people take. Even when the hearings aren't as many issued as they used to be, so many things on one day, which happened in the past. But the issues are so deep for some people. I have heard the complaint from people that they've come early in the morning, but can't stay for 10 hours to testify. And even on a limited topic. I applaud the idea that we do this on a committee by committee basis. I still think you need to limit them in Judiciary, but maybe not in other committees.

Benson: Senator Lovely.

Lovely: Thank you, good morning, I want to thank members of the panel for coming to testify today and making these recommendations. Going back down memory lane a little bit, to last session when both myself and Representative Kocot, god bless him, chaired this Committee. Then we did the conference committee in public, and we received a public records request during that process, and we adhered to it, all that information was provided to I believe a reporter at the time, who was looking for everything we talked about. The Committee staff put that together, sent them everything, very organized thankfully. We were able to comply with that request. We felt strongly about complying with that request, even though we didn't have to, but we did because it was public records.

So it can be done, there needs to be a lot of organization at the committee level to make sure that that information is available. We know how busy the committees are, especially the committee staff, and we know that each committee is different than another committee, for instance, [Consumer Protection and Professional Licensure] is a Committee that is always churning out home rule petition liquor licenses; they need to meet more often than other committees. The Judiciary is a Committee that receives so many bills, and has to go on marathon sessions to be able get through them.

I do like the idea of advance notice, like 2 weeks, maybe it's in April. Not only does that benefit the public, but it benefits the legislators who are also trying to schedule, and be in here for committee hearings. Sometimes it's only 48 hours in advance and you can't make it. I think it's important that we have the opportunity to be at these hearings and listen to the public testimony so we can know what the public is saying. The devil is in the details, I think we take some of these recommendations and work with them.

As some of you may know, I have an informal policy in my office, because I was trained as a city councilor in Salem, we had to comply with public records and open meeting law, so it's just natural to me to be able to comply. We just got a public record request last week in my office. They were requesting information that was already public, so we just replied to the post, you know, gave it to them again. Information I won't share in my office are constituent files, and things that are so sensitive, we don't want to scare the people who call our offices when they really need help. That information just won't be public. I want to commend this committee, this commission, for really working, with this panel, so we can really move this train down the track, come up with something that really does work. Thank you.

Wilmot: I just would highlight that constituent contact is not on the list [of records they recommend making public].

Benson: So I have one other question. You mentioned the Lambert case, and the SJC making a statement that the Legislature can legislate the governor's office. Where did that come from? Was it part of the Lambert case or was it later? My understanding is that it came later, so I am just curious.

Ambrogi: Well within the Lambert case, the SJC says the Legislature has chosen not to include the Governor under the public records law. That is basically the way they phrased it. So it's sort of an implication, a negative implication. They're not saying the Legislature can do this, but no one has raised a constitutional issue about this that I've seen. Even Governor Baker has acknowledged that the

Legislature can change the law with regard to the Governor's office. The Attorney General's office has said the Legislature can change the law to apply to the Governor's office. And 48 other states have the law apply to their governor's office without constitutional issues.

Benson: And did you see in your research how many other states do have a constitutional prohibition or language about this for the Legislature specifically?

Ambrogi: With regard to the Governor?

Benson: No, regarding the Legislature. You said 48 other states do not show this regarding the Governor's office. I am curious in your research. We've done research as well, but how many states have constitutional language around the Legislature?

Ambrogi: I don't know that off the top of my head, I don't know that I'm afraid.

Wolfe: I think we're all muttering to each other to come up with a proper answer, but I think the short answer is we don't know. We can't give you a specific number for how many states apply the public records law to the Legislature. We know that when the public records law of a given state is applied to the Legislature, there are different ways that shakes out. Either by legislation, by rule, and court cases that have developed, and I think that's why as we were considering the appropriate way to apply the public records law to the Legislature, we didn't just say, lets slap it on there. We were mindful that constituent communications may contain very sensitive information and very personal information. We have a lot of exemptions to the public record law: for privacy, for personnel records, for the deliberative process. But even so, it makes sense to think very carefully about the way that the Legislature may be similar to or different from the executive branch agencies, such as position to be able to respond to a public records request.

Wilmot: We can try to get you some of that information. In terms of constitutional provisions, that's not something I've seen, I've seen it more in the overall application of the statute. My memory, and I don't have the exact number, but its somewhere over half to maybe 2/3 [of states] apply [the public records law to the Legislature]. It's not complete coverage, some if it is financial records only, or contracts. There may be some like Florida which has a very expansive public records law. But there are often specific exemptions or only kinds of records covered. I've compiled it once upon a time, but we didn't have time.

Ambrogi: There is not a one size fits all approach in the Legislature, it varies state to state. We looked a lot at Pennsylvania, which has a pretty comprehensive statute on this.

Rep. Benson: Do we have more questions from members of the Commission? No? Thank you! Next we have Justin Silverman from the New England First Amendment Coalition.

Justin Silverman: Thank you. Good morning, shortly, good afternoon. I appreciate the opportunity to give some remarks, submitted earlier today, more detailed comments. My organization would also support the recommendations that were just made, particularly the statutory changes that were proposed by Mr. Ambrogi.

I will keep my comments brief, but I do want to emphasize a couple points. The first is that despite the public records law being changed just 2 years ago, we believe that the timing is still ripe to make additional changes, including bringing transparency to the Governor's office, the Legislature and the Judiciary. Particularly with the Legislature, especially given the recent circumstances and allegations of sexual harassment that have come about. In my comments I give one example of a reporter asking for records from the Legislature pertaining to those allegations generally, just to get a better sense of what is going on, how long it has been going on, and to give readers a better sense of what occurred. And those records were denied. That's the type of information we think should be available to citizens and very important to give to communities.

That being said, you do have, I believe, a tremendously difficult job and that if you agree with all the comments that have been made, and as I hope you do, find that more transparency is needed, particularly in the Legislature, it's up to you to go to your colleagues and try to convince them that the additional scrutiny is worth it for the resulting transparency. So we're counting on your leadership on that front. To that end, if my organization New England First Amendment Coalition can be a resource, if you need additional help, please let me know. I would be happy to follow up on any statements given earlier today in my testimony or answer any questions you may have.

Benson: Thank you. So it's your suggestion that all personnel records should be made public?

Silverman: In the comments we didn't give specific recommendations, instead we were more focused on convincing you, the Commission, that change was needed, and more transparency was warranted for all three branches of government. If you would like specific recommendations regarding the personnel issue, I can follow up.

Benson: And you emailed this this morning correct?

Silverman: Yes I did.

Benson: All members of the committee, if you don't have a print out, you should have it in your inbox. So I wanted to make sure to highlight that for everyone. Do we have questions from the members of the committee? No?

Benson: Thank you!

Timilty: Thank you very much.

Benson: And Mary Connaughton, welcome back!

Mary Connaughton: It's great to be back here again. I just wanted to thank you very much, Senator Timilty and Representative Benson, and all the members of the Committee for all the great work you're doing on this most important issue.

My name is Mary Connaughton, I am the director of government transparency at the Pioneer Institute. I testified before but I will testify again because more is better than less. And I want to commend the great

work you guys [the previous testifiers] have done on this issue. I think you've shown great thoughtfulness and insight.

The purpose of transparency laws is to promote more effective, accountable, responsive government. Engaged citizens are essential for a government to thrive in the long term. According to our Secretary of the Commonwealth, the Founding Fathers of our nation strove to develop an open government formed on the principles of democracy and public participation. An informed citizen is much better equipped to participate in that process, yet despite this paramount need for long term health of our commonwealth, our transparency laws remain flawed. The public records law expressly states that the law shall not apply to the records of the General Court, meaning that the state Legislature is exempt from the public records law. Although the supreme judicial court upheld the Legislature's blanket exemption, it never ruled specifically on the constitutionality of the provisions. We at Pioneer believe the Legislature's exemption to the law is unconstitutional. The Legislature's exemption from the public records law undermines the rights reserved for the people in the state constitution, and makes it impossible for citizens to uphold their end of the bargain by being engaged in the democratic process.

Our constitution explicitly states that the powers of the Legislature, its declaration of rights states that the Legislature must not pass laws that are repugnant or contrary to the constitution. Legislators in their official capacity must be at all times accountable to the people. The courts have not yet interpreted that provision. It also declares that it is a right of the people to "instruct their legislators", again this language has not been interpreted by the courts in its decisions regarding public records law. Common sense and fairness require that transparency is necessary for members of the public to hold their legislators accountable and to be able to instruct their legislators. After all, the Legislature serves the people and power is derived from the people, not the other way around. Hiding behind a veil of legislative exemption defies these clear constitutional mandates of accountability and deprives the people of their right and I dare say obligation to effectively participate in the democratic process. In terms of practical considerations that have been bandied about occasionally by individual legislators on this committee as reasons for the exemption, their key arguments don't hold water.

For instance, the protection of sensitive or personal information has been cited as one of the reasons for the blanket exemption. Yet, a narrow exception would suffice as it does elsewhere in government.

Some might say that the concept of legislative privilege trumps all this. We say no. The underlying purpose of the privilege is to support the rights of the people by promoting free and open debate in the Legislature, not undermining the people. The privilege extends to legal causes of action, not public accountability. The power resides in the people.

Pioneer believes that transparency must be pervasive throughout government. The Governor's Office should voluntarily become more transparent and open with regard to its records. The 2016 revision of

Public Records Law that, among other things, empowered this Commission to here today, to change that, and the Commission is certainly a step in the right direction.

But the SJC's ruling in the Lambert case in 1997 still casts a pall over transparency in our state. And the Governor's Office remains one of two states nationwide to claim a blanket exemption from public records law. We believe, as our letter to the Governor details that Governor Baker is in a unique position to exercise leadership on this issue.

He should suspend the application of Lambert prospectively through an executive order – at least in the short term - as this Commission considers longer-term solutions. Such an act would not be unduly burdensome to the Governor's Office – especially since Governors' Offices in most other states already do this.

It would also set an appropriately high bar and serve as a model for future governors of the Commonwealth. Thank you.

Benson: Thank you. Do we have any questions from members of the Committee? No? None at this time?

Connaughton: Thanks again.

Benson: Thank you. So that exhausts our list of those who signed up to testify. Is there anyone present that would like to make a statement? No? Well this might be the most fun you have all day. Senator? Is there anything you'd like to say? Ok, do we have a motion to adjourn?

Timilty: Seconded.

Benson: All in favor?

Commission Members: Aye.

Rep. Benson: We're adjourned.

APPENDIX C

(NCSL Press Release)

MASSACHUSETTS LEGISLATURE'S WEBSITE TAKES TOP AWARD AT NCSL SUMMIT

8/1/2018

Mick Bullock, Director of Public Affairs, Washington, D.C. Office, 202-624-3557

Los Angeles—The Massachusetts legislature's website—malegislature.gov—took home the 2018 Online Democracy Award for having a superior legislative website this week during the National Conference of State Legislatures' (NCSL) 2018 Legislative Summit in Los Angeles.

NCSL's Online Democracy Award is presented annually to a legislature, legislative chamber or caucus whose website makes democracy user-friendly in an outstanding way. The winning website is chosen by a committee of legislative staffers who evaluate each site's design, content and technological integration.

The Massachusetts General Court's website was honored for staying current with an impressive design and welcoming look and feel. The site's graphically pleasing budget tracking feature makes the budget process easy to understand and transparent. The selection committee also praised how the site highlights the most popular laws and bills and generates a list of bills that are similar to one another. Other noteworthy attributes include the website's accessibility to those with disabilities and the My Legislature feature, which encourages citizens to explore the site and follow specific bills, hearings and legislators.

The Online Democracy Award is sponsored by two of NCSL's legislative staff organizations: the National Association of Legislative Information Technology (NALIT) and the Legislative Information and Communications Staff (LINCS). Previous winners of the NCSL Online Democracy Award include the Alaska Legislature (2017), New York Senate (2016), Tennessee General Assembly (2015), Utah Legislature (2014), Massachusetts General Court (2013), Hawaii Legislature (2012), Florida Senate (2011), Washington Legislature (2010), Tennessee General Assembly (2009), Texas Legislature (2008), New Jersey Legislature (2007), Minnesota Legislature (2006) and the Utah Legislature (2005).

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NCSL is a bipartisan organization that serves the legislators and staffs of the states, commonwealths and territories. It provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues and is an effective and respected advocate for the interests of the states in the American federal system.

APPENDIX D

(Written Testimony)